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MICHAEL RODAK, JR., C

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-601

BARBARA COREY,

*Petitioner,*

v.

AVCO-LYCOMING DIVISION, AVCO CORPORATION,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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AVCO-LYCOMING DIVISION, AVCO CORPORATION,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut entered July 18, 1972.

## OPINIONS BELOW

The Memorandum of Decision of the Hearing Tribunal and the Memorandum on Setting Aside Decision and Order of Hearing Tribunal are unreported and are set out in Appendix, infra, pp. 20a thru 28a. The Opinion of the Supreme Court of the State of Connecticut is unreported. It is set out in the Appendix, infra, pp. 1a thru 19a.

## JURISDICTION

The judgment of the Supreme Court of the State of Connecticut was entered on July 18, 1972. The jurisdiction of this Court rests on 28 USC § 1257 (3).

## QUESTIONS PRESENTED

1. Whether the Congressional design of uniform federal standards of discrimination coupled with joint state-federal enforcement of those standards as set forth in Section 706(c) of Title VII of the 1964 Civil Rights Act (as amended), when viewed in light of the supremacy clause, requires that the Connecticut Fair Employment Practices Law be construed as co-extensive with Title VII so as not to frustrate or deny the Federal substantive rights of complainant?

2. Whether the Connecticut Supreme Court erred by ruling that under *Dewey* v. *Reynolds Metal Co.*, 429 F.2d 324 (6th Cir. 1970), aff'd., an employer has no duty to accommodate an employee's religious belief, when the Federal Standard as expressed in the Equal Employment Opportunity Commission's Guidelines on Religious Discrimination 32 Fed. Reg. 10298, and the recent enactment thereof into law by Congress in the Equal Employment Opportunity Act of 1972 requires reasonable accommodation, and thereby violated the Supremacy Clause of the United States Constitution?

3. Whether the Connecticut Supreme Court, by ruling that a prior arbitrator's award constituted res judicata and/or collateral estoppel as to Plaintiff's claim of religious discrimination, frustrated enforcement at the state level of the national policy against discrimination as expressed in Title VII of the 1964 Civil Rights Act (as amended) and made mandatory on the states by the Supremacy Clause of the United States Constitution?

4. Whether the Connecticut Supreme Court, by refusing to review all the evidence in the record, which evidence was duly filed before it, thwarted the enforcement of the Complainant's state and federal civil rights by a procedural technicality thus depriving the Complainant of procedural due

process as guaranteed by the Fourteenth Amendment of the United States Constitution?

## STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute involved is Section 701 of Title VII of the 1964 Civil Rights Act as amended P.L. No. 92-261, § 11, 86 Stat. 111, amending 42 U.S.C. § 2000e (1970). The constitutional provisions are United States Constitution; Article VI, Fourteenth Amendment and State Statutes — sections 31-123 through 31-128 (as amended).

## STATEMENT OF CASE

Petitioner, Barbara Corey was hired by AVCO Corporation on September 3, 1968 as a rate clerk assigned to the Traffic Division, Department 2K. At the time of her employment and for six years prior thereto, she had been a Seventh Day Adventist.

A few weeks after her employment, Mrs. Corey requested permission to adjust her working hours on upcoming Fridays to observe the Seventh Day Adventist's Sabbath. Permission was denied by AVCO. Notwithstanding the denial, Mrs. Corey left work in accordance with her Sabbath observance and was fired by AVCO.

Subsequently, Mrs. Corey filed a grievance pursuant to the collective bargaining agreement and at the same time filed a complaint with the Commission on Human Rights and Opportunities.

The Arbitration Board decided the grievance against Mrs. Corey on April 28, 1969, which award was confirmed on May 27, 1969.

After investigation, the complaint was certified and the commission caused a public hearing to be held on May 6, 1969. It was at these proceedings that the federal questions sought to be reviewed herein were first raised[1] by Amended Answer to Complaint filed by Avco.[2]

The Hearing Tribunal passed upon these questions in its Memorandum dated August 7, 1969 as follows:[3]

> ". . . The challenge of jurisdiction of the Tribunal is overruled. It is impossible for statutory responsibility of the Commission to be contracted away between employers and employers' unions. Nothing can deprive the Commission on Human Rights of its statutory jurisdiction and responsibility to hear such questions. . . ."

Avco then instituted "a record appeal" of the order of the Hearing Tribunal. The Superior Court on May 28, 1970 entered judgment against the plaintiff. The Court in its Memorandum on Setting Aside Decision and Order of Hearing Tribunal reconsidered the federal questions sought to be reviewed herein and indicated that:

> ". . . the findings and conclusions of the Board of Arbitration constitute collateral estoppel by judgment binding the Hearing Tribunal . . . By reason of her election of remedies. Complainant was foreclosed . . . etc. . . .[4]

The plaintiff appealed the lower court decision to the Supreme Court of the State of Connecticut and included in its assignments of errors,[5] the federal questions sought to be reviewed in this instance.

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[1]See Appendix (Transcript of May 6, 1969, pp. 5-14, 26-7 and 92-3), pp. 40a thru 50a.
[2]See Appendix (Commission's Exhibit #3 before Hearing Tribunal), p. 32a.
[3]See Appendix specifically #5 of Findings, p. 30a (see also Conclusion, p. 31a).
[4]See Appendix, p. 20a et. seq.
[5]See Appendix specifically #3, 4, 5, 6, 7 and 10, p. 35a.

Thereafter by decision dated July 18, 1972, the Supreme Court of the State of Connecticut considered said assignments of error and entered judgment of "no error," thereby affirming the lower court's decision.

## REASONS FOR GRANTING WRIT

### I.

Certiorari should be granted in this case because the decision of the Supreme Court is based solely on federal law or the interpretation thereof by this Court. It is the Plaintiff's position that the Connecticut Supreme Court's interpretation is incorrect and that a writ of certiorari should issue.

The Congress of the United States, in enacting the Civil Rights Act of 1964,[6] sought to provide uniform, meaningful, Federal protection of the civil rights of its citizens, Title VII of that Act established the Equal Employment Opportunity Commission (hereinafter E.E.O.C.) and provided protection against employment discrimination. One of the purposes for that Title was set forth in the House Labor Committee report for the 87th Congress which indicated:

> Testimony before the committee showed the need for Federal legislation irrespective of whether States have taken action to protect employment opportunities of minority groups. First, some 100 million people are not covered by State laws. Second, State laws vary greatly in coverage and effectiveness. Third, State commissions have encountered difficulty in dealing with the large, multiphased operations of businesses in interstate commerce. In one instance, in fact, a State court ruled that the commission had no jurisdiction over companies in

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[6] 42 U.S.C. 2000e *et seq.*

interstate commerce (Colorado: *Green* v. *Continental Airlines, Inc.*)[7]

This Court recently had occasion in *Griggs* v. *Duke Power Co.*,[8] to review the legislative history of that Act and the intent of Congress as to prohibited discrimination. In that case, this Court ruled that with regard to discrimination, intent was not always important, but that the discriminatory effects of practices were also prohibited by Congress.[9] It is clear that the Connecticut Supreme Court by ruling that there was no duty to accommodate,[10] sanctioned the discriminatory effect of Respondent's standardized hours rule on Complainant's religious practice. Therefore, the Connecticut Supreme Court's opinion does not conform to Title VII standards of discrimination as set forth by this Court in *Griggs*.

When Congress enacted Title VII of the 1964 Civil Rights Act (hereinafter Title VII), it created a system of joint state-federal administration whereby complaints, prior to filing with the Equal Employment Opportunity Commission must be deferred to a State agency for a period of 60 days.[11] It is clear that Congress wished to ensure uniform federal standards but was willing to allow enforcement to be accomplished at the State level. Additionally, Congress provided cooperation and assistance for State agencies to assist them in per-

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[7]Report of House Committee on Education and Labor, (87th Congress Second Session, February 21, 1962) as reported in Legislative History of Titles VII and XI of Civil Rights Act of 1964 by United States Equal Employment Opportunity Commission. Superintendent of Documents, U.S. Government Printing Office. The Editor notes that although this report was submitted in 1962 it provided the basis for some of the provisions in the 1964 Act.

[8]401 U.S. 424 (1971) rev'g 420 Fed. 1225 (4th Cir. 1970) aff'g in part rev'g in part 292 F. Supp. 243 (D.C. N. C. 1968).

[9]401 U.S. 424 at_____; 3 FEP 177 at_____.

[10]*Corey* v. *Avco Lycoming Division, Avco Corporation* 34 C.L.J. 3 at p. 6.

[11]Title VII §706 (b); §706(c) in amended version 42 U.S.C. 2000e *et. seq.*

forming their duties under Title VII.[12] Recently, Congress in the Equal Employment Opportunity Act of 1972[13] re-established its support of joint State-federal enforcement by requiring that E.E.O.C. give "substantial weight to final findings and orders made by State . . . authorities in proceedings commenced under state law pursuant to the requirements of . . . [706(c)]."[14] Clearly, Congress has attempted to promote the attainment and enforcement of federal standards by State agencies. Just as clearly, Congress by providing joint state-federal enforcement did not intend to dilute the substantive federal rights of persons claiming to be aggrieved by employment discrimination. Section 708 of the Act provides that Title VII will not relieve one of duties under state law unless said state law:

> . . . purports to require *or permit* the doing of any act which would be an unlawful employment practice under this title.[15]

Thus it is clear that when Congress intended to create a strong, uniform and meaningful mechanism to insure non-discrimination in employment, it chose as its device a system of cooperative federalism for the protection of federal rights. It did not intend that all Complainants would have to wait in line at the federal courthouse for vindication of substantive federal rights under Title VII. Rather, Congress intended state and federal administrative agencies would enforce federal standards as interpreted by the federal courts and ultimately this court.

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[12]Title VII §709(b) as amended
42 U.S.C. 2000e *et seq.*
[13]P.L. No. 92-261 §11, 86 Stat. 111, amending 42 U.S.C. §2000e *et seq.*
[14]Title VII §706 as amended
42 U.S.C. 2000e *et seq.* as amended
[15]Title VII §708
42 U.S.C. 2000e *et seq.* as amended

While it is clear that Congress did not wish to preempt state agencies in this field, it did intend that the substantive standards of Title VII would be enforced. Title VII requires deferral to a state agency if two general requirements are met: the state has (1) a law "prohibiting the unlawful employment practice alleged" and (2) "establishing or authorizing a state . . . authority to grant or seek relief".[16] Clearly the Connecticut Commission on Human Rights and Opportunities meets these requirements. Connecticut General Statutes § 31-126 provides, in language remarkably similar to Title VII, for the prohibition of unfair employment practices. Connecticut General Statutes §§ 31-123, 31-125, 31-127 and 31-128 clearly establish a state authority to grant or seek relief.

Mere compliance with the technical requirements is not enough. The law must be given meaning by the interpretation of agencies and courts. It is this interpretation that insures compliance with the substantive federal standards set forth in Title VII as interpreted by the Supreme Court.

It is respectfully submitted that the best and only way to insure both of Congress' goals, the protection of Title VII rights and the concept of cooperative federalism is to require state agencies and courts to comply with the Federal Standards in interpreting state law.

This conclusion is required by the Supremacy Clause. That provision requires the supremacy of the Federal Constitution, treaties and laws. Thus, if the State Commission or courts fails or refuses to eliminate unlawful discrimination, such action might be interpreted by private employers as a manifestation of governmental approval and might therefore encourage continued or increased private discrimination.

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[16]Title VII §706(c) as amended
42 U.S.C. 2000e *et seq.* as amended

Moreover, if the Commission fails or refuses to demand necessary affirmative relief when legally authorized to do so, it would allow residual discrimination to continue. As the Supreme Court has stated in *Burton* v. *Wilmington Parking Authority*:[17] "[N]o State may effectively abdicate its [Fourteenth Amendment] responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."[18]

Accordingly, there is a serious question under the Supremacy Clause of the Constitution of the United States whether such decisions are invalid and void.[19] As the Supreme Court recently stated in *Perez* v. *Campbell*:[20] "Any state legislation which *frustrates* the *full effectiveness* of Federal law is rendered invalid by the Supremacy Clause."[21] In *Perez*, the Court reaffirmed its statement in *Hines* v. *Davidowitz*[22] that the test of the validity of a state statute under the Supremacy Clause is whether the State statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[23]

This Court should grant certiorari to review and consider the important questions of Federal-State relationships

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[17]365 U. S. 715 (1961)

[18]Id. at 725; See *Ethridge* v. *Rhodes* 268 F. Supp. 83, 87 (S.D. Ohio 1967)

[19]See *Nash* v. *Florida Indus. Comm'n* 389 U.S. 235, 239 (1967)

[20]*Perez* v. *Campbell*, 402 U.S. 637 (1967)

[21]Id. at 652 (emphasis added)

[22]312 U.S. 52 (1941)

[23]Id. at 67. See e.g., *Nash* v. *Florida Indus. Comm'n.*, *supra* note 19; *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 229 (1964); *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 141 (1963); *Colorado Anti-Discrimination Comm'n.* v. *Continental Air Lines, Inc.*, 372 U.S. 714, 722 (1963) (dictum); *Free* v. *Bland*, 369 U.S. 663, 666 (1962); *Hill* v. *Florida*, 325 U.S. 538, 542-543 (1945); *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942.) See also; Ohio Atty. General's Opinion No. 72-006 pp. 8, 11. This opinion is indicative of another state's interpretation of the state-federal relationship with regard to the enforcement of Title VII rights and includes an exhaustive discussion of the argument presented herein.

in the protection of Title VII substantive rights especially in light of the Supremacy Clause of the United States Constitution.

## II.

Certiorari should also be granted in this case because the Supreme Court of the State of Connecticut misapplied Section 701 of Title VII of the 1964 Civil Rights Act as amended by the Equal Employment Opportunity Act of 1972[24] and the EEOC "Guidelines on Discrimination Because of Religion",[25] in ruling that the employer had no duty to accommodate an employee's religious beliefs. (Appendix pg. 6)

It was the clear intention of Congress in enacting the 1972 amendments that the scope and effect of Title VII should be broadly construed to eliminate employment discrimination. In debates on the amendment[26] it was explained by Senator Randolph (D-W. Va.) that the purpose of the amendment was to clarify the original intent of Section 701(j) of Title VII.[27] Section 701(j) of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000(e) was amended as follows:

> "(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

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[24]P. L. No. 92-261, §11, 86 Stat. 111, amending 42 U.S.C. §2000e (1970)

[25]32 Fed. Reg. 10298 (1967) See Also App. pp. 37a thru 40a.

[26]118 Cong. Rec. S 227-29 (daily ed. Jan. 21, 1972) (full text of the amendment)

[27]When the amendment was first introduced by Senator Randolph, he noted: "This amendment is intended, in good purpose, to resolve by legislation — *and in a way I think was originally intended by the Civil Rights Act* — that which the courts apparently have not resolved." (emphasis added)

An explanation of the effect of the amendment upon existing case law is provided in Sape and Hart, *Religious Exemption and Clarification of Religious Discrimination*, 40 Geo. Wash. L. Rev. 858 (1972).[28]

"The thrust of the amendment was to codify the EEOC 'Guidelines on Discrimination Because of Religion,' and thereby reverse the holdings of the federal courts in *Dewey* v. *Reynolds Metals Co.* and *Riley* v. *Bendix Corp.* . . . these decisions specifically stated that the EEOC guidelines which required accommodation except when undue hardship could be shown by the employer went beyond the scope and intention of Title VII.

With unanimous adoption of the Randolph Amendment, the decisions in *Dewey* and *Riley* were explicitly rejected by the Senate and the decision of the lower court in *Dewey* was resurrected."

The validity and foresightedness of this interpretation is underscored by the recent reversal of the *Riley* v. *Bendix*

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[28]221. 32 Fed. Reg. 10298 (1967).

222. 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971) (per curiam).

223. 330 F. Supp. 583 (M.D. Fla. 1971), *appeal docketed*, No. 71-3112 (5th Cir., filed Aug. 10, 1971). Also affected would be the decisions in Kettell v. Johnson, 4 FEP Cas. 394 (E.D. Ark. 1972) and Dawson v. Mizell, 325 F. Supp. 511 (E.D. Va. 1971), which have relied in part on the reasoning in either *Dewey* or *Riley*.

224. The EEOC Guidelines provide, in part:

> The Commission believes that the duty not to discriminate on religious grounds . . . includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship. . . .

29 C.F.R. §1605.1(b) (1971).

225. In *Dewey*, the court stated that "[t]he requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act." 429 F.2d at 334.

226. 118 Cong. Rec. S-253 (daily ed. Jan. 21, 1972).

227. Dewey v. Reynolds Metals Co., 300 F. Supp. 709 (W.D. Mich. 1969). *See also* Jackson v. Veri Fresh Poultry, Inc., 304 F. Supp. 12.6 (E.D. La. 1969) (upholding the EEOC Guidelines on the basis of the *Dewey* decision).

*Corp.* 330 F. Supp. 583 (5th Cir.), rev'd., 4 FEP case 951 (1972), wherein the Court emphasized the 1972 Amendments to the Civil Act 1964 and the effectiveness of the EEOC guidelines (supra p. 954):

> "If there were any doubts as to the effect to be given to these guidelines because of a lingering doubt as to whether they truly expressed the will of Congress, a significant event has since transpired which lays to rest any such doubt . . . an amendment to the Civil Rights Act of 1964, approved by the Senate of the United States on March 6, 1972, and by the House of Representatives on March 8, 1972 . . . "

and conclude (supra p. 954):

> "We conclude that since it is clear on the record that the employer here did not demonstrate that he was unable to reasonably accommodate to Riley's religious observance or practice without undue hardship on the conduct of the employer's business, Riley's discharge was an unlawful discriminatory employment practice under Title 7 of the 1964 Civil Rights Act."

In its erroneous application of the federal law and EEOC guidelines the Connecticut Supreme Court relied upon *Dewey* v. *Reynolds Metals Company*, 429 F.2d 324, 2 F.E.P. cases 687 (6th Cir., 1970), affirmed by an equally divided court, 402 U.S. 689, 91 S. Ct. 2186, 291 Fd. 2d 267. In *Dewey* (supra) the Court held that an employer when confronted with an employee whose religious beliefs conflict with the established work schedule, did not violate Title VII by failing to accommodate those beliefs, even though such accommodation would not impose an "undue hardship" on the employer. The Connecticut Court quoted directly from the Dewey decision in holding (Appendix p. 10a, 11a):

"The fundamental error of the plaintiff and the hearing tribunal is that they equate religious discrimination with failure to accommodate. These two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying beliefs and practices of his employees. *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 335 (6th Cir.), affirmed by an equally divided court, 402 U.S. 689, 91 S. Ct. 2186, 29 L. Ed. 2d 267. We agree with the board of arbitrators that it would be economically impossible for the defendant to accommodate itself to individual schedules of employees and continue to maintain a successful and efficient indusrtial operation. It was not the intention of the General Assembly that employers or labor organizations should be harassed with respect to claims not involving discrimination. Cf. *Dewey* v. *Reynolds Metals Co.*, supra.

However, as pointed out in *Riley* (supra 953) the discharge of the employee Dewey had occurred some six months prior to the issuance of the EEOC guidelines, requiring reasonable accommodation while the employee Riley was discharged after the effective date of the new guidelines. The Court in *Riley* (supra 954) emphasized the effectiveness of the EEOC guidelines with regard to religious accommodation as validated by the subsequent legislative recognition. But, the Connecticut Supreme Court in reaching its decision saw fit to ignore the amended Equal Employment Opportunity Act of 1972 which requires an employer who is confronted with an employee whose religious beliefs conflict with an established work schedule to accommodate those beliefs unless he (employer) can demonstrate that he cannot reasonably accommodate such beliefs, practices or observances without undue hardship on the conduct of his business.

## III.

This Court should also grant certiorari to review the Connecticut Supreme Court's reliance upon *Dewey* v. *Reynolds Metal Co.*,[29] for the proposition that a prior arbitration award constitutes collateral estoppel and/or res judicata on a subsequent action under a fair employment practices statute. There are many compelling reasons why this writ should be granted as hereinafter set forth.

The first and most compelling is that the competing or conflicting policies involved are fundamental national policies with which both the Congress and this Court have been concerned. The principle of arbitration is engrained in federal labor law in the Labor Management Relations Act.[30] It has found judicial expression most notably in the *Steel Workers Triolgy*.[31] The national policy against employment discrimination finds Congressional expression in Title VII of the 1964 Civil Rights Act[32] as amended by the Equal Employment Opportunity Act of 1972;[33] Executive expression in Executive Order 11246, as amended by Executive Order 11375; and judicial expression in a host of Federal District and Court of Appeals decisions as well as decisions of this Court in cases such as *Griggs* v. *Duke Power*.[34]

But these two great national policies conflict. The policy of favoring the finality of arbitration has the effect of limiting or precluding the pursuit of state fair employment practice

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[29]429 F.2d 324 (6th Cir. 1970) rehearing denied, aff'd per curiam by an equally divided court 402 U.S. 689

[30]Labor Management Relations Act §203(d) 29 U.S.C. §173(d) (1970)

[31]*United Steel Workers of America* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steel Workers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steel Workers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[32]42 U.S.C. §2000e *et seq.*, as amended

[33]P. L. No. 92-261 §11, 86 Stat. 111 amending 42 U.S.C. §2000(e) *et seq.*

[34]401 U.S. 424 (1971)

or Title VII rights. It is interesting to note that arbitration of discrimination claims involves a presentation by the employer and the union, the very parties which Congress found that employees needed Title VII protection against.

A further reason for granting certiorari in this case is this Court's decision in *Dewey* v. *Reynolds Metal Co.*[35] That decision, a 4-4 per curiam opinion, provides little guidance for courts or commentators because it is not clear whether the justices were deciding the arbitration or religious discrimination issue.[36]

An additional reason for the granting of certiorari is the fact that the Sixth Circuit has apparently narrowed its own decision in *Dewey. In the recent case of Spann* v. *Joanna Western Mills Co.*,[37] the Court held a Black man who was reinstated by an arbitrator could not then pursue his claim for back pay, denied by the arbitrator, under Title VII. However, it is most significant to note the Court's statement that:

> This case falls squarely within the reasoning and facts of Dewey, and we intimate no opinion on cases following without the scope of that decision. We hold only that where all issues are presented to bona fide arbitration and no other refuge is sought until the arbitration is totally complete, *Dewey* precludes judicial cognizance of the complaint.[38]

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[35]*supra* note 29

[36]"Note," 5 *Geo. 1. Rev.* 313, 347 (1970-71); Edwards and Kaplan, "Religious Discrimination and the Role of Arbitration Under Title VII," 69 *Mich. L. Rev.* 599, 654 (1970-71); and see cases cited *infra* in this argument and Gould, "Judicial Review of Employment Discrimination Arbitrations," a speech given before the 25th Annual Meeting of the National Academy of Arbitrators on April 7, 1972 and to be published in the National Academy's Proceedings.

[37]446 F.2d 120, 3 F.E.P. Cases 831 (6th Cir. 1971 aff'g unreported Dist. Ct. of Mich. Opinion

[38]*Id.* at 3. F.E.P. Cases 833

The facts in this case are distinguishable from *Spann* in that the Complainant won partially at arbitration; *Corey* lost. In both *Spann* and its interpretation of *Dewey*, the arbitration remedy was first completely exhausted prior to initiation of Title VII relief, *Corey* began hers simultaneously.

The Sixth Circuit in a more recent case, *Newman* v. *Avco Corp.*,[39] reversed the granting of summary judgment to the employer and union. The Court noted that the employee's failure to submit his dismissal to arbitration would have rendered it final, the employee attacked the fundamental fairness of arbitration and accused the union of bad faith and also raised the question of whether the arbitrator had authority under the contract to decide racial discrimination claims. The Court quoted the language of *Spann* noted above[40] and distinguished both *Spann* and Dewey:

> The present case falls outside of the scope of *Dewey* because it is distinguishable therefrom for the same reason that it is distinguishable from this case, namely that only in *Spann* did the Plaintiff receive and accept favorable aspects of the arbitrator's award.[41]

A final reason for granting certiorari on this issue is that there is division among the circuits on this question. It is clear that the Sixth Circuit has severly limited its *Dewey* decision. The Fifth Circuit, in its decision in *Hutchings* v. *United States Industries Inc.*,[42] emphasized that

> . . . determinations under a contract grievance-arbitration process . . . involve rights and remedies separate and distinct from those involved in judicial proceedings under

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[39]446 F.2d 120, 3 F.E.P. Cases 1137 (6th Cir. 1971)
[40]*supra* note 38
[41]*supra* note 39, 3 F.E.P. Cases 1137 at 1142
[42]428 F.2d 303 (1970) rev'g 309 F. Supp. 611 (E.D. Texas 1969)

> Title VII . . . [A] Title VII case . . . takes on a public character in which remedies are devised to vindicate the policies of the Act, not merely to afford private relief to the employee.[43]

The Tenth Circuit, in *Alexander* v. *Gardner-Denver Co.*,[44] affirmed, in a short per curiam decision, the District Court's reliance on *Dewey* for the principle that resorts to prior arbitration precluded pursuit of Title VII remedies.[45] Neither court discussed the Sixth Circuit's subsequent decisions in *Spann* and *Newman*.

The Connecticut Supreme Court in reaching its decision on this issue cited with approval the *Dewey* decision noted above.[46] The Court states that *Dewey* is directly in point[47] but this disregards *Dewey's* progeny that clearly hold that *Dewey* is a question of collateral estoppel and not election of remedies.[48] Clearly, the Plaintiff pursued *simultaneous* remedies and had not exhausted one first before pursuing the other. To invoke the doctrine of collateral estoppel and res judicata where both remedies are pursued simultaneously is to reward not the correct or better remedy for religious or other discrimination but only the faster. It is clear that overburdened state and federal agencies not to mention federal courts will lose this race, and hence Complainants, not because of a lack of expertise, or commitment but merely because the "private" settlement is usually faster.

The Connecticut Commission on Human Rights and Opportunities, as noted above, is an early and therefore im-

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[43]*Id.* at 311
[44]4 F.E.P. Case 1210 (10 Cir. 1972) aff'g 4 F.E.P. Cases 1205 (D.C. Colo. 1971)
[45]4 F.E.P. Cases 1205, 1209 (D.C. Colo. 1971)
[46]34 C.L.J. 3 at p. 5
citing *Dewey*, *supra* note 29
[47]34 C.L.J. 3 at p. 5
[48]See *Spann*, *supra*, Note 37 and *Newman*, *supra* note 39 and accompanying text.

portant step in the enforcement framework created by Congress to enforce Title VII. The policies involved in this issue are national policies of the highest priority. The answers to these questions are unclear because of this Court's Decision in *Dewey* and the subsequent narrowing of the Sixth Circuit's decision in that case. Finally, the division among the Circuits has further confused this issue. This Court should grant certiorari to answer this important federal question.

## IV.

Finally, this Court has long held that procedural technicalities should not be used to bar the enforcement of one's civil rights. Recently, this Court had the chance to again consider this question in a case under Title VII. In *Love* v. *Pullman*[49] — the procedural technicality of a second filing was rejected by this Court. See also *Sanchez* v. *Standard Brands Inc.*, 431 F.2d 455 (5th Cir. 1970) and *Jenkins* v. *United Gas Co.* 400 F.2d 28 (5th Cir. 1968). Congress, in the Equal Employment Opportunity Act of 1972, confirmed that this Court's decision in *Love* conformed to their interpretation of Title VII.

The present case raises a similar issue. Although counsel for Complainant had filed a copy of the record with the Connecticut Supreme Court as required by Conn. Gen. Stat. § 31-128, the Court refused to consider it citing only a Practice Book rule. The only evidence that the Court reviewed was portions of the transcript printed as appendices to Respondent's brief. That this prejudiced Complainant's rights is clear when the Court ruled that based on the evidence in Respondent's brief there was not "substantial and competent evidence" to support Complainant's allegations. Clearly, one would not expect an adverse party to present evidence favorable to the other side or to characterize it as such. Thus it is not sur-

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[49] 404 U.S. 522 (1972) rev'g 430 F.2d 49 (10th Cir. 1969, 1970)

prising that the Court did not find "substantial and competent evidence" to support the Complainant's allegations. However, to require a printing of evidence by Complainant's attorney (the State) or to review the whole record were not unreasonable efforts in view of the substantial issues involved. The failure to do so clearly prejudiced the Complainant's civil rights and her right to procedural due process.

This Court should grant certiorari to consider this denial of fundamental rights and the other issues raised by this petition.

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

October 13, 1972

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. _____

BARBARA COREY,

*Petitioner,*

v.

AVCO-LYCOMING DIVISION, AVCO CORPORATION,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

## APPENDIX

SUPREME COURT

February Term, 1972

Decided July 18, 1972

*Barbara Corey* v. *Avco-Lycoming Division, Avco Corporation*

Appeal from the decision and award of the hearing tribunal of the Connecticut Commission on Human Rights and Opportunities, brought to the Superior Court in Fairfield County and tried to the court, *MacDonald, J.*; judgment sustaining the appeal, from which the plaintiff appealed to this court. *No error.*

*David J. Della-Bitta*, assistant attorney general, with

whom were *F. Michael Ahern*, assistant attorney general, and, on the brief, *Robert K. Killian*, attorney general, for the appellant (plaintiff).

*Warren G. Sullivan*, with whom were *Dwight F. Fanton* and *Gregory L. Thornton*, and, on the brief, *James B Stewart*, for the appellee (defendant).

RYAN, J. This is an appeal by the named plaintiff from a judgment of the Superior Court setting aside a decision and order of a hearing tribunal of the Commission on Human Rights and Opportunities finding that the Avco-Lycoming Division, Avco Corporation, hereinafter referred to as Avco, had discriminated against her in violation of the Fair Employment Practices Act by terminating her employment because of her religion. General Statutes § 31-126(a). The plaintiff has appealed to this court.

There were only two witnesses who testified before the hearing tribunal, the plaintiff and Pasquale Cipriano, the assistant director of industrial relations for Avco. The plaintiff printed no appendix of evidence to her brief, as required by Practice Book § 645. The evidence printed in the appendix to the defendant's brief discloses the following: The plaintiff Barbara Corey was employed by the defendant Avco on September 3, 1968, as a rate clerk and was assigned to the traffic division, department 2K. Her scheduled hours of work were from 8:15 a.m. to 5 p.m., Monday through Friday. She had been fully informed previously of these details during her job interview and at that time made no objection to working those hours.

Three bargaining units at the Avco Stratford plant represent approximately one-half of Avco's employees and they include Local 376 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., of which Mrs. Corey was a member. There

is a collective bargaining agreement between Avco and Local 376 dated August 4, 1967, which was in effect during the period of time when Mrs. Corey was employed by Avco.

The plaintiff worked from September, 1968, until November, 1968. During this period she had one day off, with pay, for personal reasons. When an employee takes an occasional day off for personal reasons the company does not always know whether the time off is taken for a religious observance. Late in October, 1968, the plaintiff went to see Mr. Marfiak, the manager of the traffic department, told him she was a Seventh Day Adventist and asked permission to leave work before sundown on certain Fridays in order to observe the Sabbath. She testified that Seventh Day Adventists celebrate a Sabbath which begins at sundown on Friday and continues until sundown on Saturday and that it was her own interpretation of her religious obligations which required her to leave work early on Fridays. Marfiak informed her that she could not have the time off as requested. Subsequent to this interview she was advised to see Mrs. Stoddard concerning a job on an earlier shift. Mrs. Stoddard attempted to find a comparable job for her with earlier hours. The plaintiff was in the hospital from November 4 to November 9, 1968, and returned to work on November 10, 1968. On Friday, November 15, 1968, the sun set before 5 p.m. and she again informed Marfiak of the necessity of leaving the plant about 4:45 p.m. She showed him a calendar stating the exact time of sundown in Massachusetts to indicate the times at which she wished to leave the plant each Friday for the next sixteen weeks. He again denied her request. In spite of her failure to obtain permission, the plaintiff left work about thirty-five minutes early on Friday, November 15, 1968. On Monday, November 18, at a meeting with Marfiak, two union stewards and two other men, she was terminated from her employment for insubordination. Following the termination of her employment she filed a grievance pursuant to the terms of the collective bargaining agreement

charging that her discharge violated the contract because it was discriminatory on religious grounds. She also filed a complaint with the Commission on Human Rights and Opportunities alleging that the same conduct violated § 31-126(a) of the General Statutes.

The grievance was processed through the various steps and through arbitration by Local 376 which was certified by the National Labor Relations Board to be the collective bargaining agent for the members of the collective bargaining unit to which the plaintiff belonged. Pursuant to the provisions of article IV of the collective bargaining agreement, a hearing was held before the board of arbitration on the plaintiff's grievance on March 27, 1969, at which hearing the plaintiff testified as a witness in her own behalf. Throughout the grievance proceedings Mrs. Corey was represented by a union representative of Local 376. Following the hearing on March 27, 1969, the board of arbitration issued its award dated April 28, 1969, and documented as American Arbitration Case No. 12 30 0040 69. The board of arbitration denied the grievance in all respects and sustained and confirmed the action of the company in terminating the grievant's employment. The award of the arbitrators was introduced in evidence before the commission.

The hours of work in department 2K during the months of October and November, 1968, were from 8:15 a.m. until 5 p.m. Mrs. Corey was the only employee in department 2K assigned to the job classification of rate clerk. Since Mrs. Corey was still in the midst of the training process up to the termination of her employment with Avco and she still required and received considerable supervision, she was not permitted to adjust her scheduled hours of work. Because she was the only rate clerk in the department, she received different substantive training than any other employee in her department. The plaintiff's training was dependent on a rate

analyst for supervision but the analyst was not always available, at all times during the day, because he had other responsibilities to perform. No one was working in department 2K prior to 8:15 a.m. The need for Mrs. Corey to be present until 5 p.m. every day was the same need that existed for every other employee to be available in the event that anything had to be done. During her absence from department 2K, her work and duties were performed by a rate analyst who was in a higher job classification and was paid more than the plaintiff.

Since the basic claim of the plaintiff was that her employment was terminated because of discrimination against her because of her religion, evidence was offered as to the treatment of people of other religious faiths who were employees of the company. Those Jewish employees of Avco who were members of the bargaining unit were not generally permitted to take time off to observe Rosh Hashanah because the bargaining agreement sets forth only specific holidays. Some of these employees may be given the time off without pay, but this is a decision within the discretion of individual departmental supervisors. Yom Kippur is not a listed holiday for employees in the bargaining unit. From time to time employees of various religious beliefs requested time off for religious holidays and Avco acceded to certain of such requests on occasion, but the requests were very irregular and not for the same day for a period of sixteen weeks.

On March 19, 1969, Avco wrote to the plaintiff reaffirming a job offer which it claimed previously had been made to her by Mrs. Stoddard in the plant. The job referred to in the letter was for a crib control clerk in department 19S. In contrast to the plaintiff's earlier testimony that Mrs. Stoddard told her there was no job available on an earlier shift, she admitted to testifying before the board of arbitration that Mrs. Stoddard had advised her that there was shop work available on an earlier shift. The plaintiff showed no interest in the position offered to her.

On May 6, 1969, the hearing tribunal of the commission reached a decision in the plaintiff's favor. They concluded that there was, in fact, discrimination in that the plaintiff was deprived of her employment because of her religion and that no "bona fide occupational qualifications or need" were shown and ordered the company to reinstate her with back pay and allow her to cease work at sundown on Fridays. On appeal to the Superior Court, the defendant urged as it had before the tribunal that the award of the board of arbitration was res judicata and that the hearing tribunal was thereby-precluded from directing or ordering the defendant to act in contravention of the arbitration award; that the findings and conclusions of the hearing tribunal were not supported by substantial and competent evidence, and that the tribunal erred in concluding that the defendant had discriminated against the plaintiff because of her religion. The trial court concluded that the findings and conclusions of the board of arbitration constitute collateral estoppel by judgment binding the hearing tribunal and precluding contrary and inconsistent findings on identical issues; that the plaintiff by reason of her election of remedies was foreclosed from seeking a more favorable result than that rendered by the board of arbitration; and that the record of evidence before the tribunal indicates that the conclusions of fact were not supported by substantial evidence. In her appeal to this court the plaintiff assigns error in these conclusions of the trial court.

Article XIII, Section 3 of the agreement between Avco and the union provides as follows: "Neither the Company nor the Union shall discriminate against any employee on account of race, creed, sex or national origin." The board of arbitration after a full hearing reached the conclusion that there was no discrimination against the plaintiff because of her religion. The language of the arbitrators is significant. "To put it another way, since the Company does not intend to accommodate itself to individual schedules, as indeed it could not

if it desires to continue to maintain an efficient industrial operation, it cannot accede to grievant's request in this instance without itself being in violation of the . . . Collective Bargaining Agreement proviso. The grievant has no right or entitlement to request the Company so to act." The arbitration award was confirmed by order of the Superior Court on June 5, 1969, and no appeal was ever taken from that judgment. "The judgment or decree so entered shall have the same force and effect in all respects as, and be subject to all provisions of law relating to, a judgment or decree in a civil action; and it may be enforced as if it had been rendered in a civil action in the court in which it is entered." General Statutes § 52-421.

The first question to be determined is whether the decision of the board of arbitration constituted a bar or estoppel binding the hearing tribunal under the doctrine of res judicata. The doctrine of res judicata is one of rest and is enforced on the ground of public policy. *Brady* v. *Anderson*, 110 Conn. 432, 435, 148 A. 365. To prevent a multiplicity of actions, equity will enjoin further litigation of a cause of action which has already been adjudicated. A final judgment on the merits is conclusive on the parties in an action and their privies as to the cause of action involved. If the same cause of action is again sued on, the judgment is conclusive with respect to any claims relating to the cause of action which were actually made or might have been made. *Bridgeport Hydraulic Co.* v. *Pearson*, 139 Conn. 186, 196, 91 A.2d 778; *Lehrman* v. *Prague*, 115 Conn. 484, 490, 162 A. 15; *Scott* v. *Scott*, 83 Conn. 634, 638, 78 A. 314. Collateral estoppel is that aspect of res judicata which is concerned with the effect of a final judgment on the subsequent litigation of a different cause of action involving some of the issues determined in a former action between the parties. *Brockett* v. *Jensen*, 154 Conn. 328, 337, 225 A.2d 190. "(1) Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties

in a subsequent action on a different cause of action. . . . (2) A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action. Restatement, Judgments § 68." *Brockett* v. *Jensen*, supra.

We have held that res judicata and collateral estoppel depend on the existence of a valid final judgment by a court of competent jurisdiction. *Waterbury Savings Bank* v. *Danaher*, 128 Conn. 78, 92, 20 A.2d 455; *Ruocco* v. *Logiocco*, 104 Conn. 585, 595, 134 A. 73. The question is raised as to the propriety of using the decision of an arrbitration panel as a prior adjudication for the purposes of res judicata. Despite frequent statements which indicate acceptance of the proposition that the doctrine of res judicata is not applicable where the earlier decision was made, not by a court, but by an administrative agency, or that the doctrine does not ordinarily apply to decisions of administrative tribunals, there is a wealth of reason and authority for the application of that doctrine, or a similar doctrine, to the determinations of an administrative agency in a proper case, generally where the determinations are made for a purpose similar to those of a court and in proceedings similar to judicial proceedings. In any event, the doctrine of res judicata may apply to a judgment rendered by a court on review of a decision made by an administrative body. 46 Am. Jur. 2d, Judgments, § 455.

No satisfactory reason can be assigned why an award, which the parties have expressly stipulated should be final as to the subject submitted, should not be as conclusive as a court-rendered judgment. 2 Freeman, Judgments (5th Ed.) § 636. The more recent cases also indicate that a decision of an administrative board, acting in a duly authorized judicial capacity, is a prior decision within the rule of res judicata. *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421, 86 S. Ct. 1545, 16 L. Ed. 2d 642; *Tidewater Oil Co.* v.

*Jackson*, 320 F.2d 157, 161 (10th Cir.) The cases also apply the doctrine to the award of an arbitration panel in bar of subsequent litigation on the same claim. *James L. Saphier Agency, Inc.* v. *Green*, 293 F.2d 769 (2d Cir.); *International Union* v. *Weatherhead Co.*, 203 F. Sup. 612, 619 (N.D. Ohio); *Livingston* v. *Shreveport-Texas League Baseball Corporation*, 128 F. Sup. 191, 202 (W.D. La.), affirmed, 228 F.2d 623 (5th Cir.); *Glens Falls Ins. Co.* v. *Garner*, 229 Ala. 39, 155 So. 533; *General Exchange Ins. Corporation* v. *Harmon*, 288 Ky. 624, 157 S.W.2d 126; *Matter of Publishers Assn. (New York Stereotypers)*, 15 Misc. 2d 931, 181 N.Y.S.2d 527; *Feinstein* v. *Carl-Dress Corporation*, 156 N.Y.S.2d 636; *Inglis* v. *Trickey*, 172 Okla. 114, 45 P.2d 135; *Rueda* v. *Union Pacific R. Co.*, 180 Ore. 133, 175 P.2d 778; *Ferguson* v. *Ferguson*, 127 S.W.2d 1018, 1021 (Tex. Civ. App). "The award . . . valid on its face . . . has the force of a judgment, and therefore becomes *res judicata* as to all matters embraced in the submission . . . between the parties." *Campbell* v. *Campbell*, 45 App. D.C. 142, 154A, cert. denied, 242 U.S. 642, 37 S. Ct. 114, 61 L. Ed. 542. "An arbitration award is accorded the benefits of the doctrine of res judicata in much the same manner as the judgment of a court." 6 C.J.S., Arbitration and Award, § 97.

The plaintiff also urges that the doctrine of res judicata is inapplicable in the case before us because there was no identity of issues or parties before the board of arbitration and the hearing tribunal of the commission. The plaintiff Barbara Corey was a grievant before the board of arbitration and the complainant and the plaintiff in the matter before the hearing tribunal of the Commission on Human Rights and Opportunities. Under the terms of the contract, she elected to have the union present her grievance to management.[1] In such a

[1]Under § 9(a) of the National Labor Relations Act; 49 Stat. 453, 29 U.S.C. § 159(a); an individual employee who is a member of a bargaining unit covered by a collective contract retains the right individually to present his grievance to management. The contract involved in the case at bar affirms that principle.

situation the union acts in her behalf as her statutory agent. *Vaca* v. *Sipes*, 386 U.S. 171, 194, 87 S. Ct. 903, 17 L. Ed. 2d 842; *Republic Steel Corporation* v. *Maddox*, 379 U.S. 650, 655, 85 S. Ct. 614, 13 L. Ed. 2d 580. While the arbitration was conducted by the union, there can be no question that privity existed between her and the union. There was, therefore, an identity of parties. The question basic to the determination of the board of arbitration and the hearing tribunal was the same: Did AVCO discriminate against the plaintiff in her employment because of her religious creed? The question of fact essential to the judgment was actually litigated and determined by a valid and final judgment and under the doctrine of collateral estoppel this was conclusive on the hearing tribunal. "The rules of res judicata create substantive rights and are not merely procedural. They exist in order to limit a person to one opportunity to settle a dispute between himself and another." Restatement, Judgments § 80, comment (b), p. 362.

The decision in *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir.), rehearing denied, affirmed per curiam by an equally divided court, 402 U.S. 932, 91 S. Ct. 2186, 29 L. Ed. 2d 267, is directly in point with the present case. Dewey alleged that he had been unlawfully discharged from his employment because of his religious beliefs. He filed a grievance under his collective bargaining agreement claiming violation of the antidiscrimination clause therein. The matter went to arbitration and the issues were decided against him. He also filed charges under title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000e. He brought an action under the Civil Rights Act alleging that he had been unlawfully discharged because of his religious beliefs. Since the arbitrators had decided the issues against him the court held that this precluded a relitigation of the same claim on the ground of collateral estoppel. "The arbitrator had jurisdiction to determine the grievances. The arbitration involved an interpretation of the

collective bargaining agreement with respect to Dewey's clams that he had been laid off and discharged because of his religious beliefs. In arbitration proceedings, frequently questions of law and fact are resolved by the arbitrator. Where the grievances are based on an alleged civil rights violation, and the parties consent to arbitration by a mutually agreeable arbitrator, in our judgment the arbitrator has a right to finally determine them. Any other construction would bring about the result present in the instant case, namely, that the employer, but not the employee, is bound by the arbitration." *Dewey* v. *Reynolds Metals Co.*, supra, 332.

The plaintiff would have us ignore the *Dewey* rule and follow the fifth circuit's decision in *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303 (5th Cir.). We note, however, that the collective bargaining agreement in the *Hutchings* case did not contain an antidiscrimination clause. This aside, the thrust of the *Hutchings* case is that discrimination in employment is a public wrong and that the individual plaintiff sues to vindicate a public right. We too believe and affirm that job discrimination is a public wrong, but we believe that the violation of the public right is remedied and the public interest is served by affording the plaintiff the opportunity to have the question determined by a fair and impartial tribunal which can grant an adequate remedy. It is not in the public interest, however, to condone a procedure which would permit a plaintiff to litigate the same question over and over again, encumbering the mechanisms our society has established to resolve disputes and subjecting the defendant to incessant harassment. Litigation must end at some point. The rules of res judicata are designed to accomplish this important public policy. See "Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964," 84 Harv. L. Rev. 1109, 1225.

The plaintiff also assigns error in the court's conclusion that the hearing tribunal's findings are not supported by the evidence before it. "The findings of the hearing tribunal as to the facts, if supported by substantial and competent evidence, shall be conclusive." General Statutes § 31-128 (b). Substantial and competent evidence is that which carries conviction. It is such evidence as a reasonable mind might accept as adequate to support a conclusion. It means something more than a mere scintilla and must do more than create a suspicion of the existence of the fact to be established. *New Canaan* v. *Connecticut State Board of Labor Relations*, 160 Conn. 285, 289, 278 A.2d 761; *L. Suzio Construction Co.* v. *Connecticut State Board of Labor Relations*, 148 Conn. 135, 138, 168 A.2d 553; *Hoyt-Bedford Co.* v. *Connecticut State Board of Labor Relations*, 147 Conn. 142, 147, 157 A.2d 762; *Imperial Laundry, Inc.* v. *Connecticut State Board of Labor Relations*, 142 Conn. 457, 461, 115 A.2d 439; see *International Brotherhood* v. *Commission on Civil Rights*, 140 Conn. 537, 543, 102 A.2d 366.

A careful analysis of the evidence before the hearing tribunal, previously recited in this opinion, serves to confirm the conclusion of the trial court that the findings of the tribunal were not supported by substantial and competent evidence. The fundamental error of the plaintiff and the hearing tribunal is that they equate religious discrimination with failure to accommodate. These two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying beliefs and practices of his employees. *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 335 (6th Cir.), affirmed by an equally divided court, 402 U.S. 689, 91 S. Ct. 2186, 29 L. Ed. 2d 267. We agree with the board of arbitrators that it would be economically impossible for the defendant to accommodate itself to individual schedules of employees and continue to maintain a successful and efficient industrial operation. It was not the intention of the General Assembly that employers or labor organizations should be harassed with respect to claims

not involving discrimination. Cf. *Dewey* v. *Reynolds Metals Co.*, supra.

The remaining assignments of error do not require discussion.

There is no error.

In this opinion HOUSE, C. J., SHAPIRO and FITZGERALD, Js., concurred.

LOISELLE, J. (concurring). I agree with the second ground of decision—that there is not sufficient evidence to support the conclusion of the Commission on Human Rights and Opportunities—and believe the disposition of this case should be made solely on that ground.

Preliminarily, I must question whether the majority opinion's authority for holding that parties are bound by the decision of an official administrative agency of the government is authority for holding them bound in *all* respects by an arbitrator's award, in view of the dictum of *Waterbury Savings Bank* v. *Danaher*, 128 Conn. 78, 92, 20 A.2d 455, and the very limited scope of judicial review to which awards are subject; General Statutes § 52-418; *Gary Excavating Co.* v. *North Haven*, 160 Conn. 411, 414, 279 A.2d 543; see *United Steelworkers Trilogy*, 363 U.S. 564, 568, 574, 593, 598, 80 S. Ct. 1343, 1347, 1358, 4 L. Ed. 2d 1403, 1409, 1424; whether the fact that Mrs. Corey lodged a grievance makes her a party to the arbitration proceeding which eventually determined it, in view of the particular contract in this case and *McCaffrey* v. *United Aircraft Corporation*, 147 Conn. 139, 141—42, 157 A.2d 920, cert. denied, 363 U.S. 854, 80 S. Ct. 1636, 4 L. Ed. 2d 1736; whether administrative agencies are to be overturned when they do not follow the sometime-applied judicial policy of collateral estoppel, in view of cases such as *Waterbury* v. *Commission on Human Rights & Opportunities*, 160 Conn. 226,

230, 278 A.2d 771, *Viola* v. *Liquor Control Commission*, 158 Conn. 359, 361, 260 A.2d 585, and *Zawisza* v. *Quality Name Plate, Inc.*, 149 Conn. 115, 118-20, 176 A.2d 578, which traditionally limit the basis for our review to whether they have acted illegally, arbitrarily and in abuse of discretion or without foundation in substantial and competent evidence.

The legislative mandate which vests the Commission on Human Rights and Opportunities with the power to use the authority of law and the resources of government to eliminate invidious discrimination in employment is more compelling than the considerations in favor of foreclosing the action of the commission on the theory of collateral estoppel. Under these circumstances, the doctrine of estoppel should not be applied. I do not believe, moreover, that there is an identity of issues.

There is no dispute that there must be an identity of issues actually litigated before the arbitrators and the commission before the doctrine of collateral estoppel can be applied. For the commission to have determined the same question as the arbitration panel, discrimination would have to mean the same thing to both bodies. The majority implicitly finds such concurrence of standard without comparing the construction of the statutory provision, under which the commission acted, with the construction of the contractual provision, under which the arbitration panel acted.

The award cites the sources which the arbitrators considered in reaching their decision, including federal standards, and omits any reference to the state statute, under which the commission ruled, either as extra-contractual rights of the employee or as a guide to interpreting the contract. Because the award does not purport to deal with the statutory rights of the employee, foreclosing the employee from asserting his statutory rights to the commission may deny him the right to be heard with respect to them by either the commission or

the arbitrators. Where it does not appear with reasonable certainty, from a submission and award, that rights were submitted for determination, there should be no bar. *Hopson* v. *Doolittle*, 13 Conn. 236, 240.

General principles of arbitration make it indisputable that the arbitrators were concerned with the contract and not with the statute. An agreement for the submission of issues to arbitration constitutes "the charter of the entire arbitration proceedings and defines and limits the issues to be decided by the arbitrators." *Gores* v. *Rosenthal*, 150 Conn. 554, 557, 192 A.2d 210. If, as in this case, the contract does not require the arbitrators to apply legal standards, "arbitrators are not required to decide according to law. . . . '[They] are not bound to follow strict rules of law, unless it be made a condition of the submission.' " *Chase Brass & Copper Co.* v. *Chase Brass & Copper Workers Union*, 139 Conn. 591, 595—96, 96 A.2d 209; see *United Steelworkers* v. *Enterprise Corporation*, 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424.

Arbitrators commonly apply contract standards of discrimination rather than legal standards or make no reference to the applicable legal standards. See, for example, awards collected by Edwards & Kaplan in "Religious Discrimination and the Role of Arbitration under Title VII, 69 Mich. L. Rev. 599, 645 n.225. If arbitrators are not necessarily considering legal rights when they construe contracts governing the same subject area, this court should be reluctant to consider these legal rights concluded by such arbitration. See Mr. Justice Harlan's concurring opinion in *United States Bulk Carriers* v. *Arguelles*, 400 U.S. 351, 361—62, 91 S. Ct. 409, 27 L. Ed. 2d 456, in which he discusses the comprehensiveness of arbitration.

Even if the language of the statute and contract were the same, their construction may be different because the rules for their interpretation differ dramatically. In construing con-

tracts, arbitrators look, for example, to industrial harmony and the long standing practices of the industry and the shops covered by the contract—the common law of the shop. *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409; see *Local 1078* v. *Anaconda American Brass Co.*, 149 Conn. 687, 691—92, 183 A.2d 623 (*Baldwin, C. J.*, concurring). In construing statutes, the courts look, for example, to expressed purposes and legislative history and accord great deference to the construction given the statute by the agency charged with its enforcement. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433, 91 S. Ct. 849, 28 L. Ed. 2d 158; *Downer* v. *Liquor Control Commission*, 134 Conn. 555, 561, 59 A.2d 290. When two bases for interpretation diverge, it is hard to conclude that conclusions which flow from them necessarily converge. Perhaps for this reason, several United States Circuit Courts of Appeals share the view that the doctrine of collateral estoppel should not necessarily be applied to bar a determination of discrimination under a fair employment statute.[1]

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[1] *Voutsis* v. *Union Carbide Corporation*, 452 F.2d 889, 894 (2d Cir.), United States Supreme Court appeal pending (Title VII proceeding in spite of prior settlement by a state Human Rights Commission); *Taylor* v. *Armco Steel Corporation*, 429 F.2d 498, 499 (5th Cir.) (consideration in spite of judicial determination prior to Civil Rights Act); *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303 (5th Cir.) (prior arbitration award); *Fekete* v. *United States Steel Corporation*, 424 F.2d 331, 333 n.3 (3d Cir.) (suit for injunctive relief not mooted by arbitration award); *Norman* v. *Missouri Pacific R.*, 414 F.2d 73, 84 (8th Cir.) (prior judicial determination under Railway Labor Act); see also *Tipler* v. *E. I. DuPont deNemours & Co.*, 443 F.2d 125, 129 (6th Cir.) (consideration of Title VII claim in spite of prior determination on discrimination by N.L.R.B.: "This is because the purposes, requirements, perspective and configuration of different statutes ordinarily vary"); see, e.g., *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir), cert. denied, 393 U.S. 1093, 89 S. Ct. 872, 21 L. Ed. 2d 784; *N.L.R.B.* v. *Stafford Trucking, Inc.*, 371 F.2d 244 (7th Cir.); *Title* v. *Immigration & Naturalization Service*, 322 F.2d 21, 25 (9th Cir.). Even the 6th Circuit Court's *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 332, affirmed by an equally divided court, 402 U.S. 689, 91 S. Ct. 2186, 29 L. Ed. 2d 267, is limited so as not to apply to the facts of this case. *Newman* v. *Avco Corporation-Aerospace Structures Division*, 451 F.2d 743, 748 (6th Cir); *Spann* v. *Kaywood Division, Joanna Western Mills Co.*, 446 F.2d 120, 122 (6th Cir.).

In statutes of equal dignity, the legislature has conferred the power to construe contracts on arbitrators; General Statutes §§ 52-408—52-421, 31-91—31-100; and the power to determine unfair employment practices under statutes relating to the commission; General Statutes §§ 31-122—31-128. That this may result in overlapping remedies should not void either so long as no one is unjustly enriched. Experience under federal labor acts suggests that the Sixth Circuit Court may have been overcautious in its apprehension that allowing an agency determination of statutory rights to upset an arbitrator's determination of contract rights would be the death knell of arbitration. See *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir.), affirmed by an equally divided court, 402 U.S. 689, 91 S. Ct. 2186, 29 L. Ed. 2d 267. The National Labor Relations Board has precisely that power, which it has sometimes exercised with respect to unfair labor practices and arbitration has not disappeared from that area.

If we are to say that an employee cannot pursue his statutory rights when the contract under which he works covers the same subject matter, we must face the fact that we are construing the statute as not applying to the vast number of union employees, like the complainant in this case, whose contracts require that grievance procedures be the exclusive employee remedy, and who may be bound to exhaust these remedies before turning elsewhere. See *Glover* v. *St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 89 S. Ct. 548, 21 L. Ed. 2d 519; *Vaca* v. *Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842; *Republic Steel Corporation* v. *Maddox*, 379 U.S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580. Even in the absence of such a requirement to exhaust contract remedies; see *United States Bulk Carriers* v. *Arguelles*, 400 U.S. 351, 91 S. Ct. 409, 27 L. Ed. 2d 456, *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (5th Cir.); it is only reasonable to infer that the legislature understood that the natural reaction of an employee faced with a grievance would be to complain to his union represent-

ative and that the legislature did not intend that such an act, perhaps made without advice of counsel and while unaware of alternatives, should eliminate the employee from the protection of the statute by estoppel.

It may well be that Connecticut's Fair Employment Practices Act takes the view that invidious discrimination by its very nature is a public wrong. That view is buttressed by the fact that the act did not simply create civil liability for discrimination, it set up a commission to investigate a complaint of discrimination, with the power to compel testimony and the production of records and grant immunity from prosecution; provided for one of its commissioners or investigators to attempt conciliation; directed the attorney general to argue the case against the employer; and provided remedies which may be substantially broader than those available to an arbitrator under a contract. *Carey* v. *General Electric Co.*, 315 F.2d 499, 510 (2d Cir.), cert. denied, 377 U.S. 908, 84 S. Ct. 1162, 12 L. Ed. 2d 179, distinguished between "the private interests advanced in the arbitral forum and the public interest advanced in the administrative forum." *N.L.R.B.* v. *Marine Workers*, 391 U.S. 418, 425, 88 S. Ct. 1717, 20 L. Ed. 2d 706, noted that enacted legislation in an area otherwise a matter of private concern may bring it into the "public domain."

The essential question is whether an arbitration proceeding should deprive the commission of the power conferred by statute to act on behalf of that public interest when it receives an individual's complaint. See *Newman* v. *Avco Corporation-Aerospace Structures Division*, 451 F.2d 743, 746 (6th Cir.). Although through dicta and in a different context, Chief Judge Lehman, I believe, has answered the question: "The Board is not solely a judicial body appointed to adjudicate impartially controversies between employers and employees. The Board is a public agency acting in the public interest; the instrument created by the Legislature to assure

to the people of the State protection from the 'unfair labor practices' described in the statute. . . . An order of the Board commanding that an employer shall cease and desist from such unfair labor practices vindicates a public right to protection against conduct which the Legislature has found is inimical to the welfare of the People of the State. No agreement of the employee and the employer and no litigation between them for the vindication of their private rights can deprive the public of its right to protection against labor practices which the Legislature has forbidden. Doubtless, as the Appellate Division pointed out in its opinion, the court, in making its determination in the injunction suit, gave consideration to the public interest but the People of the State had no opportunity in that action to contest the issue whether the Employer has been guilty of the 'unfair labor pratices' described in the complaint of the Labor Relations Board. *A determination of the issues in an action between private parties cannot bar a contest to vindicate the public interest, as provided in the statute* [emphasis supplied], just as a judgment in civil litigation between private parties does not bar a contest of the same issues by the State in a criminal action. . . . No principle of *'res judicata'* or of 'estoppel' and no public policy precludes an investigation of the facts by the Labor Board in the public interest or bars the Board from making a valid order commanding the Employer to 'cease and desist' from acts which upon such investigation appear to be unlawful and which constitute 'a continuing means of thwarting the policy of the Act.' " *Matter of New York State Labor Relations Board (Holland Laundry, Inc.)*, 294 N.Y. 480, 63 N.E.2d 68, rehearing denied, 295 N.Y. 568, 64 N.E.2d 278.

No. 137318

BARBARA COREY

v.

AVCO-LYCOMING DIVISION,
AVCO CORPORATION (APPEAL FROM HEARING TRIBUNAL, CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES)

Superior Court, Fairfield County, at Bridgeport

May 28th, 1970

## MEMORANDUM ON SETTING ASIDE DECISION AND ORDER OF HEARING TRIBUNAL

This is an appeal taken by Avco-Lycoming Division, Avco Corporation (hereinafter called Petitioner) from a decision and order of a Hearing Tribunal of the Connecticut Commission on Human Rights and Opportunities rendered on August 7, 1969 pursuant to the Fair Employment Practice Act, Chapter 563, General Statutes of Connecticut finding that Petitioner had discriminated against one Barbara Corey (hereinafter called Complainant) in violation of § 31-126(a) of the General Statutes by terminating her employment because of her religion.

A summary of the factual background is as follows:

Complainant was hired by Petitioner on September 3, 1968. Having had no prior work experience of any kind, she was hired as a rate clerk assigned to the Traffic Division, Department 2K with working hours from 8:15 to 5:00 p.m. Monday through Friday, as fully explained to her at the time without objection or questioning by Complainant. During her employment, Complainant was being trained as a rate clerk

by a rate analyst who gave her instructions when his work schedule permitted, and during this period she was paid one full week for absence because of illness and another day when absent for personal reasons.

A few weeks after her employment commenced, and thus during the early stages of her training program, Complainant requested, not an adjustment in her working hours, but time off to enable her to leave the plant early every Friday for a period of sixteen weeks in order to fulfill her own individual interpretation of her religious obligations as a Seventh Day Adventist, giving her immediate supervisor a list of sunset times on the sixteen dates of her claimed Sabbath observance. (Petitioner's Exhibit 1 below)

Complainant's request for such time off to leave work early on Fridays was denied and although she was fully aware that leaving work early would result in her being discharged for insubordination and violation of Plant Conduct Rules, she left the plant on November 15, 1968, approximately 35 minutes before the end of her scheduled shift, such discharge coming after due hearing.

Claiming her discharge unjust and discriminatory on religious grounds, Complainant filed a grievance against Petitioner pursuant to Article IV of the collective bargaining agreement between her statutorily constituted collective bargaining agent U.A.W., and its Local 376 and Petitioner, which grievance was fully prosecuted by Complainant and Local 376 through the various procedural steps set forth in said Article IV up to and including final arbitration on March 27, 1969, before a three-man Board of Arbitration in American Arbitration Association Case No. 12 30 004069.

The Award of the Board of Arbitration (Exhibit A) was issued on April 28, 1969, in favor of Petitioner, AVCO, stating, among other conclusions:

"To put it another way, since the Company does not intend to accommodate itself to individual schedules, as indeed it could not if it desires to continue to maintain an efficient industrial operation, it cannot accede to grievant's request in this instance without itself being in violation of the cited Collective Bargaining Agreement proviso. The grievant has no right or entitlement to request the Company so to act."

The Arbitration Award was confirmed by order of this Court on June 5, 1969 in case No. 136591 (Fairfield County) entitled *Avco-Lycoming Division, Avco Division* v. *Local* 376, *U.A.W.* and such order, never having been appealed, became final and constitutes the first of the following reasons why the decision, findings of fact, conclusions of law and order of the Hearing Tribunal should be in all respects annulled and set aside.

I.

The Hearing Tribunal wholly failed to give effect to the Findings and Award of the Board of Arbitration in an arbitration proceeding instituted by Complainant and her statutorily constituted collective bargaining agent, U.A.W., and its Local 376, under and pursuant to the provisions of the collective bargaining agreement between Petitioner and Complainant's said bargaining agent covering the same facts and issues subsequently presented to and relitigated, over Petitioner's objections, before the Hearing Tribunal. More specifically, the Hearing Tribunal failed to give effect to the following findings of the Board of Arbitration:

(1) That the provision of the said collective bargaining agreement establish and regulate the terms and conditions of employment of Complainant, Barbara Corey, and other members of her bargaining unit.

(2) That Complainant's request for special hours of work on each Friday for an extended period of sixteen weeks could not be granted because it would constitute a violation of Article XIII, Section 3 of the said Agreement and would constitute discrimination in her favor and against those employees in the said bargaining unit who were denied identical or similar requests over an extended period to accommodate personal situations such as "outside school, babysitting, transportation, and family obligations".

(3) That Complainant had accepted employment without protest with the full awareness of the required hours of work and that she had declined comparable employment offered to her by Petitioner on a shift which did not conflict with her alleged Friday religious obligations.

(4) That Complainant was dismissed for violation of uniformly enforced plant conduct rules prohibiting employees *inter alia* from leaving work before the end of the shift, proscribing insubordinate conduct and neglect of job duties or refusal to perform work assigned and that her discharge was for just and proper cause.

The said Award of the Board of Arbitration was subsequently confirmed and enforced in all respects by the judgment of this Court entered on June 5, 1969, in *Avco-Lycoming Division, Avco Corporation* v. *Local* 376, *U.A.W.*, following a full hearing at which Complainant was represented by her said bargaining agent. No appeal having been taken from said judgment of this Court, the findings and conclusions of the Board of Arbitration are final and binding both under the law and policy of this State and of the United States as a valid interpretation of the requirements of the collective bargaining agreement governing all members of the bargaining unit affected, including Complainant.

". . . An award of an arbitrator acting within the scope of his authority has the effect of a judgment and is conclusive as to all matters submitted for decision at the instance of the parties."

*Todd Shipyards Corp.* v. *Industrial Union of Marine and Shipbuilding Workers of America,* 242 F. Supp. 606, 611-12 (D.C. N.J.,) (1965).

*International Association of Machinists and Aerospace Workers* v. *Aerojet-General Corporation,* 263 F. Supp. 343, 345-46 (D.C. Calif., 1966).

"Federal laws is clear that the determinations of arbitrators are final and binding in labor cases."

*Hill* v. *Aro Corporation,* 275 F. Supp. 482, 485, 67 LRRM 2037 (N.D. Ohio, 1967), citing *General Drivers, Local* 89 v. *Riss & Co.,* 372 U.S. 517, 9 L. Ed. 2d 918, 83 S. Ct. 789 (1963).

The finality of arbitration was furthermore agreed upon by the parties to the collective bargaining agreement in this case. Article IV, Section 2, Step 4(d) of said agreement provides that the majority decision of the Board of Arbitration shall be final and binding" upon the parties thereto. The courts of this State have consistently ruled that "the parties must abide by their election", since "every provision in a contract should be given effect."

*Chase Brass & Copper Co.* v. *Chase Brass & Copper Co. Workers Union,* 139 Conn. 591, 596 (1953)

". . . Particularly is this so in the light of the well-established principle that arbitration is a favored procedure and courts will uphold the finality of awards. . . ."

*International Union* v. *Fafnir Bearing Co.,* 151 Conn. 650, 653 (1964).

*United Electrical Radio & Machine Workers* v. *Union Manufacturing Company*, 145 Conn. 285, 288 (1958). *Colt's Industrial Union* v. *Colt's Manufacturing Company*, 137, Conn. 305, 309 (1951).

Complainant's claim of religious discrimination against Petitioner was rejected by the Board of Arbitration, which found that Complainant had been discharged for just and sufficient cause, but Complainant, dissatisfied with the Board's decision, nevertheless pursued her claim with the Commission on Human Rights and Opportunities in the proceedings below. The grievance which Complainant pursued to final arbitration was clearly founded upon the same allegations of religious discrimination which served as the basis for her complaint subsequently heard by the Hearing Tribunal. In other words, Complainant, having voluntarily elected to pursue to a conclusion her contractual remedy as a member of Local 376, has caused the identical issue to be fully litigated in two separate forums, but it appears obvious that the preservation of industrial stability through the arbitration process requires a holding that Complainant's election to give full play to the grievance procedure established in the collective bargaining agreement precluded her from validly relitigating in other forums issues already decided adversely to her.

The doctrine of *res judicata* emerged from our common law to prevent the multiplicity of actions that has occurred here, and equity will enjoin further litigation of a cause of action already adjudicated.

*Bridgeport Hydraulic Co.* v. *Pearson*, 139 Conn. 186, 195, 196. (1952)

*Wehrhane* v. *Peyton*, 134 Conn. 486, 494 (1948)

When a Board or Commission, acting within its jurisdiction and field of competence, makes a judicial determination which is final in form and substance it should be given the

same effect as *res judicata* in the field of fact as would be accorded the judgment of a court.

*United States* v. *Utah Const. & Mining Co.*, 384 U.S. 394, 421 (1966);
*Tidewater Oil Co.* v. *Jackson*, 320 F.2d 157, 161 (1963);
*Penn General Casualty Co.* v. *Pennsylvania*, 294 U.S. 189, 195 (1935)

See *Moschziskel "Res Judicata"*, 38 *Yale Law Journal*, 299, 329 (1929)

The Arbitration Award in this case incorporated by reference all the material facts of the Award into the order and judgment of this court. No appeal having been taken from such judgment, the findings and conclusions of the Board of Arbitration constitute collateral estoppel by judgment binding the Hearing Tribunal and precluding contrary and inconsistent findings on identical issues. This rule has been invoked and applied to administrative proceedings under the Civil Service Act; (*Bentley* v. *Teton*, 153 N.E. 2d 495) in the Court of Claims; (*Delatush* v. *United States*, 151 Ct. Cl. 405) and before the Interstate Commerce Commission. (*N.Y.S. & W. R. Co.* v. *Central R. Co. of N.J.*, 156 N.Y. S.2d 199)

By reason of her election of remedies, Complainant was foreclosed from seeking a more favorable result than that rendered by the quasi-judicial body duly constituted to hear and dispose of her claim.

*Washington* v. *Aerojet-General Corporation*, 282 F. Supp. 517, 523 (D.C. Calif. 1968);
*Edwards* v. *North American Rockwell Corp.*, 291 F. Supp. 199 (D.C. Calif. 1968)
*Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955)

To permit the Hearing Tribunal to totally disregard that portion of the contract of the collective bargaining agreement involved here, as previously interpreted and applied by the Board of Arbitration would serve to render nugatory the policy of this State and the United States which clearly favors such agreements for arbitration.

II.

The Hearing Tribunal's Findings and Conclusions are not supported by the evidence before it, and must be set aside for that reason regardless of the doctrine of Res Judicata discussed above.

Section 31-128 (b) of the General Statutes requires that the findings and conclusions of the Hearing Tribunal must be supported by "substantial and competent evidence" and the record of evidence before the Tribunal falls far short of fulfilling the definition of "substantial evidence" as given by our Supreme Court in such cases as *L. Suzio Construction* v. *Conn. State Board of Labor Relations*, 148 Conn. 138, 139; *International Brotherhood of Electrical Workers, Local* 35 v. *Commission on Civil Rights*, 140 Conn. 537, 543 and *McKinley Park Homes, Inc.* v. *Commission on Civil Rights*, 20 Conn. Supp. 167, 172. Many of the Tribunal's conclusions of fact simply are not supported by the Record which seems to indicate clearly that the Complainant's employment was terminated because of her refusal to work her regularly assigned shifts and not because of her religious beliefs. A similar conclusion was reached by this court in a case almost squarely in point with the issues of fact presented here. *Rosie S. Williams* v. *Commission on Civil Rights et al.* 28 Conn. Supp. 241, decided in 1969, rejected a Seventh-Day Adventist's claim that her employer must allow its employees to absent themselves from their regularly assigned work if such absence is based upon religious convictions. This decision was affirmed by our Supreme Court in December, 1969, as reported in 158

Conn. 622, and still stands as conclusive on the express point involved despite the extensive efforts of Complainant's brief to distinguish it.

For the foregoing reasons, the decision, findings of fact, conclusions of law and order of the Hearing Tribunal are in all respects annulled and set aside and judgment may enter in favor of the Petitioner.

MacDonald, *J.*

NO. F.E.P. SW 12-68 FEP 22

BARBARA COREY v. AVCO-LYCOMING

Hearing Tribunal, Hartford, Connecticut August 7, 1969

## MEMORANDUM OF DECISION

The petitioner herein filed a complaint against the respondent, Avco-Lycoming of Stratford, alleging that she was terminated from her employment because of her religion. The complaint was brought pursuant to Section 31-126 of the Connecticut General Statutes (Rev. of 1958) and was heard before a specially appointed tribunal consisting of Igor I. Sikorsky, Jr., Mrs. Sarah G. Rosenthal and Mr. Theodore Hogan.

## FACTS

1. The complainant is a 37 year old female who is a member of a religious denomination known as the Seventh-Day Adventist.

2. One of the tenets of the Seventh-Day Adventist faith precludes its members from performing work from sundown on Friday, to sundown on Saturday.

3. On September 3, 1968, the complainant was hired as a "Rating Clerk" by respondent, and assigned to the Traffic Department. Her duties consisted mainly of filing.

4. Some time in October, when daylight saving time was no longer in effect, it became clear that sundown would occur on Friday, a few minutes before the end of her normal working hours, which were from 8:15 a.m. to 5 p.m.

5. She discussed this fact with her employer and requested that she be allowed to leave a few minutes early on each Friday during the months of November, December and January, until such time as sundown occurred after 5 p.m. The aggregate time for which she asked to be excused from work over the entire period of three months amounted to less than seven hours.

6. The company has an unwritten policy that allows members of the Jewish Faith to take off their principal holidays. All Christian holidays are recognized. Further, this policy vests in supervisory personnel who have the responsibility of ascertaining whether other religious absences should be excused or not.

7. The pre-employment application contains no question as to the prospective employee's religious affiliations or beliefs.

## FINDINGS

1. The allegation that an alternative employment was offered by the employer in 1968, was not supported by the evidence.

2. The complaint of Barbara Corey of Dec. 3, 1969 v. Avco-Lycoming was duly filed before the 90 day filing limitation had elapsed as provided by the Statute.

3. The complainant was willing to accommodate her employer for the time requested by agreeing to forfeit pay for the time off; to take a comparable job assignment, the hours of which would not run past sundown on Friday; or make up during her lunch hour the time she had lost.

4. The respondent sought by innuendo and by the record of prior arbitration proceedings and by self-serving correspondence to establish that such an offer was made. Significantly the employee of the company who was alleged to have made this offer was still under the control of the respondent and was in the state at the time of the hearing, but was not presented to the Tribunal. The Tribunal takes judicial notice of the fact of the failure to present this testimony which would be the best possible rebuttal. The inference is unmistakeable that the testimony of the employee would not support the allegations of the respondent.

5. Subsequent to her termination, the respondent and the respondent's Union joined in an application under the Grievance Committee procedures of their contract. The matter was arbitrated to the satisfaction of the Union, but not to the petitioner. Respondent alleged vigorously and repeatedly that these proceedings created "an estoppel" or an "election of remedies" or "res ajudicata" thus barring further hearings on the matter by the Commission on Human Rights and Opportunities. This challenge of the jurisdiction of the Tribunal is overruled. It is impossible for statutory responsibility of the Commission to be contracted away between employers and employer's Unions. Nothing can deprive the Commission on Human Rights of it's statutory jurisdiction and responsibility to hear such questions.

6. There is insufficient proof that Mrs. Corey's request could have been legitimately denied by the respondent because of a "bona fide occupational need."

## CONCLUSION

THE HEARING TRIBUNAL CONCLUDES THAT:

1. It has jurisdiction to hear this case which was properly before the Commission on Human Rights and Opportunities, in that presented a question pursuant to Section 31-126 of Connecticut General Statutes (Rev. of 1958) as to whether there was discrimination on the grounds of religion in the matter of employment.

2. There was, in fact, discrimination in that the complainant was deprived of her employment because of her religion and that no "bona fide occupational qualifications or need" was shown by respondent which would justify her being treated in a manner more strictly than that of the other employees of the respondent.

## ORDER

The Tribunal, therefore, orders the immediate reinstatement of the complainant, Barbara Corey, to her position as "Rate Clerk" together with all benefits and rights that would have been hers had she not been wrongfully discharged.

It further orders that she be given back pay from the date of discharge and that the respondent company permit Mrs. Corey henceforth to observe her Sabbath by ceasing work at sundown on Fridays.

Dated at Hartford, Connecticut, this 7th day of August, 1969.

HEARING TRIBUNAL

IGOR I. SIKORSKY, JR.

THEODORE F. HOGAN, JR.

SARAH G. ROSENTHAL

STATE OF CONNECTICUT

COMMISSION ON HUMAN RIGHTS
AND OPPORTUNITIES

In the Matter of (Mrs.) BARBARA COREY, *Complainant*,

v.

AVCO LYCOMING DIVISION, *Respondent*.

Case No. F.E.P. SW 12-68 FEP 22

## AMENDED ANSWER TO COMPLAINT AGAINST UNFAIR EMPLOYMENT PRACTICE

Now comes AVCO LYCOMING DIVISION, AVCO CORPORATION, Stratford, Connecticut, Respondent herein, by its attorneys, Naphin, Sullivan & Banta; and for its answer to the complaint herein states as follows:

1. The complaint herein should be dismissed on the ground that the complainant, Barbara Corey, elected to pursue the remedy provided her under and pursuant to a certain collective bargaining agreement between Respondent and United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Local 376, dated August 4, 1967, a copy of which is attached hereto marked Exhibit A and made a part hereof, by filing a grievance pursuant to Article IV of the said agreement and processing it through the various steps of the grievance procedure up to and including arbitration before a duly constituted board of three arbitrators, said arbitration resulting in an award of the board of arbitration, marked Exhibit B, attached hereto and made a part hereof, in which her claim and that of the union, her statutory bargaining agent, was denied and the action of the Company in terminating the grievant in that proceeding, the complainant herein, was fully sustained and confirmed.

2. The complaint herein should be dismissed for the following additional reasons:

a. The said award of the board of arbitration is by the terms of the said collective bargaining agreement, Article IV, Section 2, step 4(d), final and binding upon the parties and the complainant is thereby estopped to proceed with her complaint before the State of Connecticut Commission on Human Rights and Opportunities.

b. The said award of the board of arbitration is res judicata with respect to the matters complained of herein.

c. The complaint herein has been rendered moot by reason of complainant's rejection of comparable employment in another job classification and department during shift hours which would not conflict with her alleged religious Sabbath obligations.

d. Accommodation to the request for special hours of work made by complainant over an extended period would have imposed an undue hardship on respondent.

e. The requirement that complainant work a full shift from 8:15 AM to 5:00 PM was a bona fide occupational qualification.

3. In the alternative and as further answer to the complaint filed herein, respondent denies that complainant was terminated because of her religion, admits that complainant was terminated on November 18, 1968, for violation of plant conduct rules following a disciplinary hearing held in the industrial relations department of respondent's plant in Stratford, Connecticut on November 18, 1968 at which complainant and her statutory collective bargaining agent appeared, admits that complainant refused to follow her foreman's orders on November 15, 1968, left the plant and her job without per-

mission and prior to the end of her regularly scheduled work shift and respondent states that with respect to the balance of the matters alleged in the complaint herein it is without sufficient information or knowledge to form a belief and prays for strict proof thereof.

WHEREFORE, respondent asks that the complaint be dismissed.

AVCO LYCOMING DIVISION,
AVCO CORPORATION
Stratford, Connecticut,
*Respondent*

By: WARREN G. SULLIVAN
*Its Attorneys,*
Naphin, Sullivan & Banta

105 West Adams Street
Chicago, Illinois 60603

CEntral 6-0177

*Assignments of Error*

The Court erred:

1. In finding that the days and hours of appellant's employment were fully explained to her prior to her hiring, and further that said appellant accepted such explanation without question of appellee (appellant below).

2. In finding that appellant requested not an adjustment in work hours, but time off to enable her to leave the plant early on Friday.

3. In finding that the Tribunal of the Commission on Human Rights and Opportunities had to give effect to the Findings and Award of a Board of Arbitration, said arbitration resulting from a grievance filed by appellant.

4. In finding that an election of remedies by appellant barred said litigant from pursuing her constitutional rights, and her rights under Connecticut statutes.

5. In finding that appellant could and did contract away her constitutional rights, and her rights under Connecticut statutes.

6. In finding that the labor arbitration and subsequent appeal had the effect of being res judicata and hence a final disposition of this case.

7. In finding that the bringing of a complaint under applicable Connecticut statute constituted a collateral attack on the arbitration award and that such was barred by the principle of collateral estoppel.

8. In finding that the issues before the Labor Arbitration and the Commission on Human Rights and Opportunities were identical.

9. In finding that the Hearing Tribunal's conclusions were unsupported by evidence before it.

10. In finding that it is not a constitutionally protected right for one in the exercise of his religion to be granted an opportunity to pursue the religion when the employer grants similar privileges to members of other religious groups.

Appellant,

By: ROBERT K. KILLIAN,
Attorney General.
C. MICHAEL BUDLONG,
Assistant Attorney General.

Filed Aug. 27, 1970.

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Supreme Court, Fairfield County, *Clerk's Office.*

The above and foregoing is a true copy of the record in said case to be used in the trial in the Supreme Court.

J. LEO CAMPANA,
Clerk.

Equal Employment Opportunity Commission
RELIGIOUS DISCRIMINATION GUIDELINES
(Effective June 15, 1966)

"Section 1605.1 Observance of Sabbath and religious holidays. — (a) (1) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular work week. These complaints arise in a variety of contexts, but typically involve employees

who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year.

"(2) The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.

"(3) However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, not withstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.

"Likewise, an employer who closes his business on Christmas or Good Friday is not thereby obligated to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur:

"(b) While the question of what accommodation by the employer may reasonably be required must be decided on the peculiar facts of each case, the following guidelines may prove helpful.

"(1) An employer may permit absences from work on religious holidays, with or without pay, but must treat all religions with substantial uniformity in this respect. However, the closing of a business on one religious holiday creates no obligation to permit time off from work on another.

"(2) An employer, to the extent he can do so without serious inconvenience to the conduct of his business, should make a reasonable accommodation to the needs of his emees and applicants for employment in connection with special religious holiday observances.

"(3) The employer may prescribe the normal work week and forseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs.

"(4) Where an employee has previously been employed on a schedule which does not conflict with his religious obligations, and it becomes necessary to alter his work schedule, the employer should attempt to achieve an accommodation so as to avoid a conflict. However, an employer is not compelled to make such an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees."

Equal Employment Opportunity Commission
RELIGIOUS DISCRIMINATION GUIDELINES

(Effective July 10, 1967)

"Section 1605.1 Observance of Sabbath and other religious holidays. — (a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe

certain special religious holidays during the year and, as a consequence, do not work on such days.

"(b) The Commission believe that the duty not to discriminate on religious grounds, required by section 703(a) (1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

"(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people."

STATE OF CONNECTICUT

COMMISSION ON HUMAN RIGHTS
AND OPPORTUNITIES

MAY 6, 1969

Corey v. Avco Lycoming Division, Avco Corporation

BEFORE A HEARING TRIBUNAL:

IGOR I. SIKORSKY, Chairman
SARAH G. ROSENTHAL
THEODORE F. HOGAN

FOR THE COMPLAINANT:

DAVID B. BEIZER, ESQ.
Assistant Attorney General

FOR THE RESPONDENT:

WARREN G. SULLIVAN, ESQ.

MR. SULLIVAN: All right.

MR. BEIZER: We will affix that to the same exhibit.

MR. SULLIVAN: I hope everybody understands this has to be an expedited hearing because I am in a two hour parking zone. (Laughter)

CHAIRMAN SIKORSKY: I think to the extent that counsel can join in agreeing to the facts, to the extent that this is possible, and limiting the issue to a question of jurisdiction and a question of law which I can see shaping up from a look at the complaint, then that would go a long way to expediting this hearing also.

MR. BEIZER: Mr. Sullivan, I wonder if you would have extra copies of your two answers, or an extra copy? Do you care to have those in?

(Discussion off the record.)

MR. BEIZER: To make the record complete, the respondent has filed a non-dated — I'm sorry, it is dated April 9, 1969 which should be entered as Commission's Exhibit B, just for the purposes of continuity.

(The above-described document was received and marked Commission's Exhibit B.)

MR. BEIZER: And there is an amended answer — well, I cannot find a date on it.

MR. SULLIVAN: It's on the certificate of service on the back.

MR. BEIZER: Well, I cannot see it. This is an undated amended answer which was received in our office a few days ago which may be marked as Commission's Exhibit C.

(The above-described document was received and marked Commission's Exhibit C.)

MR. SULLIVAN: Will you stipulate that the amended answer was also received by the complainant as is required by the rules?

MR. BEIZER: It is stipulated that two copies were received by the Commission. As far as the complainant goes, it is so stipulated.

MR. SULLIVAN: Thank you.

MR. BEIZER: If the Tribunal pleases, I think I would move at this time to present witnesses as opposed to making

arguments, and I would also move to defer argument on the motion to dismiss for reasons which will appear through the testimony. I think that the allegations in the motion to dismiss are legal, and since the factual matter is relatively short, that the Tribunal can take up all the legal matters at the conclusion.

MR. SULLIVAN: Well, it seems to me that under the Commission's regulations that first of all it is one of the obligations of the Hearing Tribunal, as well as one of the rights of the parties, to present oral motions at the hearing and to make arguments with respect to them. It further seems to me that the argument on this motion may well persuade the Hearing Tribunal that there is no necessity for going further, and I believe they might dismiss the action. Consequently, by putting it off until the end, we are duplicating the work involved and going into areas which are unnecessary in this proceeding, in our opinion.

I would like to present the motion orally which is made by way of answer in the documents which you now have before you, and I would like to present oral argument with respect to them.

(Discussion off the record.)

CHAIRMAN SIKORSKY: Let me ask this question of both counsel. An admittedly brief perusal of the pleadings would indicate, would at least imply, there are large areas of agreement here on life facts. Is there a lot of factual dispute between the parties, are we predominantly in a position of an issue of the status of the hearing? This is something I don't think any of us would be prepared to rule off the bench on.

MR. BEIZER: Mr. Chairman, I don't know whether the facts would bear this out, but it is my feeling that the area of dispute, the factual dispute is relatively small. The amount

of testimony that is needed to make a complete record of what occurred in this case will be relatively short and not time-consuming. Therefore, I say that let all the legal arguments come at the end. I am prepared to rebut whatever argument brother counsel wishes to make, but I think it will just be a disjointed hearing if we hear it now. I think the matters raised in his motion to dismiss are properly special defenses which should be raised and should be argued subsequent to the complaint itself.

MR. SULLIVAN: Well, let me say that it is going to be impossible to avoid the legal discussion throughout the hearing. As perhaps you have already observed from the pleadings, our primary assertion is that the prosecution of a grievance containing essentially the same allegations and identical facts and issues as are here presented constituted an election of remedy on the part of the complainant, and that that decision is binding on the complainant, and furthermore constitutes res adjudicata, as far as this proceeding is concerned.

Secondly, and in any event, and without regard to what happens to this motion, the complainant is estopped with respect to the facts to claim anything other or different than the arbitrator or the board of arbitration found to be the facts in the course of his proceeding, or their proceedings, and I am prepared to argue that and cite some authorities to the Hearing Tribunal if it gets to that point.

CHAIRMAN SIKORSKY: The Commission will rule that the complainant may present testimony, in other words, we will, without prejudice to your raising your motion again, deny it at this time. I want to make it absolutely clear that the only purpose of that ruling in the Hearing Tribunal's mind is to try to hear all the legal questions at one time. What we would like to do is to urge counsel on both sides to try to agree on the underlying facts insofar as they can, and then be prepared to present in a memorandum of law after this

hearing is concluded, their claims of law and their supporting authority on all issues, jurisdictional and substantive. You may proceed.

MR. BEIZER: Mrs. Corey, would you please take the stand?

CHAIRMAN SIKORSKY: My fellow Tribunal member indicates that my statement about liking you to do it may sound like it is too polite. The liking you to do it is a polite way of saying that that is what the Tribunal wants.

MR. SULLIVAN: I think I have preserved for the record an exception grounded on two bases: No. 1, I believe my motion is preliminary rather than postliminary, and secondly, I have not had a full opportunity to acquaint the Tribunal of the basis of the motion.

CHAIRMAN SIKORSKY: I don't want to appear to cut you off from your preliminary right to tell us what we are doing. I don't want to be in a position of going through an endless round for your sake and ours also. Do you feel you can add something that would substantially change or add to the grounds, the general grounds here?

MR. SULLIVAN: I believe the basics are contained in our answer to which is attached a copy of the award of the board of arbitration. I agree with that.

I certainly intended to expand on it in the course of oral argument, as well as to cite authorities in support of our position.

CHAIRMAN SIKORSKY: Well, we seem to be playing games here. How long do you anticipate in time that you would need to put on your factual case as you see it for this Tribunal?

MR. BEIZER: Twenty minutes.

CHAIRMAN SIKORSKY: Well, based on the fact that we are delaying counsel's opportunity to argue for twenty minutes, I will overrule the objection and ask Mr. Beizer to proceed.

MR. BEIZER: Do you want to take the stand, and before taking the stand, please raise your right hand?

BARBARA L. COREY, having been called as a witness, was duly sworn and testified on her oath as follows:

DIRECT EXAMINATION

BY MR. BEIZER:

Q. Mrs. Corey, can I request that you virtually shout to be heard? I know you speak softly anyway, and I would like you to speak loudly without any fear of bowling the Tribunal over. A. All right.

Q. They are all strong individuals. You are how old?
A. Thirty-seven.

Q. And did you at one time apply for a job with the Avco Lycoming Division of the Avco Corporation? A. Yes.

MR. SULLIVAN: If I may, Mr. Chairman, I believe it is necessary for me to make a matter of record, my objection to proceeding along the lines which have already been adjudicated and decided from a factual standpoint by the board of arbitration, completely aside from the election of remedies argument. There is an estoppel, it seems to me, by reason of the facts that the same parties here are involved, and even if you assume the matter is not strictly res adjudicata for the purpose of arguing this point, because it is based on a different cause of action or what have you, the decision of the arbitra-

tor with respect to the facts, that is, the finding with respect to the facts operates as an estoppel in this proceeding, and as to those facts. The complainant is not in a position, legally, to claim or contend otherwise, nor is this Tribunal in a position to entertain other than the matters as found by the board of arbitration.

MR. BEIZER: Mr. Chairman, I must say that in my limited experience at the bar, I have yet to hear as auspicious an argument as Mr. Sullivan makes at this time. I am surprised that he uses the term "estoppel." Estoppel, as a matter of law, is a principle that says that one is not allowed in a subsequent proceeding to certain facts which are contrary to, inconsistent with, the facts that have already been asserted in a prior legal proceeding. Generally, this is a matter of record.

There are two things here: one, there has been nothing that has been introduced which is inconsistent with, to my knowledge, anything that has been introduced or been established at a prior hearing. For that reason alone, estoppel does not apply.

Secondly, there is no record here before this Tribunal of any matter other than some reference in an amended answer to a finding, and an award of a board of arbitration. Now clearly, there is no transcript that has been introduced. There is no set of findings which specifically delineates what has and what has not been found. To say as baldly as Mr. Sullivan says, that we are estopped from asserting facts here which have been established by the board of arbitration, smacks of non-reason, not reason. I would move we move ahead as quickly as possible.

CHAIRMAN SIKORSKY: Well, gentlemen, the objection is noted. You have preserved your rights, Mr. Sullivan.

MR. SULLIVAN: There have been two matters raised which I think require response, Mr. Sikorsky. No. 1, under Connecticut law —.

CHAIRMAN SIKORSKY: Well, gentlemen, the Commission has ruled. I don't want to be discourteous and I don't want to deny you of your rights, but this is precisely what the Tribunal wishes to avoid, that is, preliminary debates on this, and I will rule these out of order until we have a factual basis on which this Tribunal can move. Noting your exception for the record, counselor, I will instruct Mr. Beizer to proceed with the factual record.

MR. SULLIVAN: I take it I will have a continuing objection to Mrs. Corey's testimony?

MR. SULLIVAN: Thank you.

CHAIRMAN SIKORSKY: It is so noted.

* * *

had to be filed away. They keep these for years back. They have to have them. Bills paid are to be filed away in the paid file, of course.

CHAIRMAN SIKORSKY: Now, both counsel, I don't mean to foreclose anybody on either side of the situation, but as I read the complaint and the answer, it seems to me that a lot of this, for whatever legal significance it may have in the future, is essentially agreed to. Is there any question about the type of job here? Does that come into the religious issue in any way, or her performance on the job?

MR. BEIZER: No, I have a sneaky suspicion that insofar as he has raised in his answer the question of undue harship and a burden on the Company, he will raise the question or bring up the argument that the Company would be at a dis-

advantage if they had to let this lady off a few minutes early on certain days. I am about to demonstrate that the nature of the job was such that it wasn't crucial in the overall operation of Avco to keep this lady here at that time. I think I am entitled to proceed on those grounds.

MR. SULLIVAN: I assume that because he has undertaken to state what my position is, that I get a crack at it too. First of all, the statute and regulations say, "Undue hardship or need." I call the attention of the Tribunal to the use of the word "need" as well. I also think that it is clear from our answer that we are saying that there is a bona fide occupational qualification. Now, I don't know whether the Commission feels that it is entitled to tell us what work we need to perform in the plant or what work we feel is necessary to make the engines for all the helicopters, except Sikorsky helicopters, in Vietnam, but I think it is safe to say that the Company is taking the position that it established a job requirement, and that that job requirement, regardless of the complainant's analysis of the skills involved, is the requirement the Company established and was willing to pay money for.

MR. BEIZER: Shall I proceed?

CHAIRMAN SIKORSKY: I think that clarifies in my own mind the problem to some extent. I think both counsel have made their legal positions clear to me. You may proceed.
BY MR. BEIZER:

Q. Now, Mrs. Corey, were you ever instructed that the job you had to perform had to be performed under any certain time requirements? A. No.

Q. Were you ever given any instructions that certain things had to be done at a certain time? A. The only thing is that the bills were to be in by Thursday. That was the only

time requirement we had. I took the bills in to the paymaster on Thursday.

* * *

is then a line for the signature of a notary public which is left blank. I have no objection to the substitution of the documents, though.

MR. SULLIVAN: Thank you. The addition is a correct one, which I agree with.

Mr. Chairman, I understand from previous comments that you intend to hold your legal rulings until a written memorandum is submitted.

CHAIRMAN SIKORSKY: I think we should and I think in all fairness to both complainant and respondent, we should give you some ideas of the areas of questions, both the ones that have been raised in the proceedings today, and the ones that are inferentially involved. Certainly one question is the question of whether or not a contract between an employer and a union can oust the Commission on Human Rights and Opportunities from jurisdiction in general. In other words, can it be binding and conclusive? That is very definitely a question of interest to us. It has broad ramifications.

Secondly, whether this fact or any facts that were developed in this particular case can oust jurisdiction because of some particular aspect, such as estoppel or the like. Those two questions are very clearly, you might say, threshold questions for us to resolve.

MR. SULLIVAN: Well, because of the fact that I am now advised and I presumed all along that you were not deciding the issue of estoppel with respect to findings of fact in the arbitration award, it seems to me that I have to also proceed to ask this witness certain basic questions with respect to the

matter before the Tribunal, so that in the event that you err legally, I may put it in this fashion that there is an alternative record available.

CHAIRMAN SIKORSKY: Be my guest. Unless you feel — do you feel it is the proper time to adjourn for lunch and reconvene at 2:00 o'clock? I presume this is something you would not anticipate concluding in five minutes.

MR. SULLIVAN: No, sir.

CHAIRMAN SIKORSKY: We will adjourn. We will report back here at 2:00 o'clock.

(Luncheon recess.)

CHAIRMAN SIKORSKY: Shall we go back on the record?

MR. SULLIVAN: Mr. Cipriano, you understand you are still under oath?

THE WITNESS: I do.

BY MR. SULLIVAN:

Q. What were the hours of work in Department 2K during October and November, 1968?

# EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972

Public Law 92-261, 92nd Congress, H. R. 1746, March 24, 1972

## AN ACT

To further promote equal employment opportunities for American workers.

*Be it enacted by the Senate and House of Representatives United States of America in Congress assembled,* That this Act may be cited as the "Equal Employment Opportunity Act of 1972".

Sec. 2. Section 701 of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e) is amended as follows:

(1) In subsection (a) insert "governments, governmental agencies, political subdivisions," after the word "individuals".

(2) Subsection (b) is amended to read as follows:

"(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, except that during the first year after the date of enactment of the Equal Employ-

ment Opportunity Act of 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers."

(3) In subsection (c) beginning with the semicolon strike out through the word "assistance".

(4) In subsection (e) strike out between "(A)" and "and such labor organization", and insert in lieu thereof "twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, or (B) fifteen or more thereafter,".

(5) In subsection (f), insert before the period a comma and the following: "except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision."

(6) At the end of subsection (h) insert before the period a comma and the following: "and further includes any governmental industry, business, or activity".

(7) After subsection (i) insert the following new subsection (j):

"(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Sec. 3. Section 702 of the Civil Rights Act of 1964 (78 Stat. 255; 42 U.S.C. 2000e-1) is amended to read as follows:

* * *

## CONNECTICUT GENERAL STATUTES

*Sec. 31-123. Commission on civil rights. Appointment. Duties. The commission shall continue to consist of ten persons appointed by the governor. On or before July fifteenth, annually, the governor shall appoint two members, each to serve for a term of five years, to succeed those whose terms expire. The members of the commission shall choose, annually, from their number, a chairman and a deputy chairman. The commission shall investigate the possibilities of affording equal opportunity of profitable employment to all persons, with particular reference to job training and placement. The commission shall compile facts concerning discrimination in employment, violations of civil liberties and other related matters. The commission shall investigate and proceed in, as provided in section 31-124 to 31-128, inclusive, all cases of discrimination in employment because of race, color, religion, age, national origin or ancestry. The commission shall, as provided in section 4-60, report to the governor the result of its investigations with its recommendations for the removal of such injustices as it may find to exist. Except as provided in section 31-124, the members of the commission shall serve without pay, but their reasonable expenses, including necessary stenographic and clerical help, shall be paid by the state upon approval of the commissioner of finance and control. (1949 Rev., S. 7400, 7402; September, 1957, P.A. 11, S. 13; 1959, P.A. 145, S. 2.)

* History: 1959 act added "age" to sixth sentence.

Sec. 31-124. Hearing examiners. Compensation of examiners and commissioners. There shall continue to be ten hearing examiners. On or before July first, annually, the governor shall appoint two hearing examiners, each to serve for a term of five years, to succeed those whose terms expire. Each such examiner and each commissioner shall receive twenty-five dollars per day for each day on which he conducts hearings, and their reasonable expenses, including necessary stenographic and clerical help, shall be paid by the state upon approval of the commissioner of finance and control. When serving as members of a hearing tribunal as hereinafter provided, each hearing examiner shall have the same subpoena powers as are granted to commissioners by subsection (f) of section 31-125. (1949 Rev., S. 7403.)

Sec. 31-125. Powers of the commission. The commission shall have the following powers and duties: (a) To establish and maintain an office in the city of Hartford; (b) to appoint such investigators and other employees and agents as it deems necessary, fix their compensation within the limitations provided by law and prescribe their duties; (c) to adopt, publish, amend and rescind regulations consistent with and to effectuate the provisions of this chapter; (d) to recommend policies and make recommendations to agencies and officers of the state and local subdivisions of government to effectuate the policies of this chapter; (e) to receive, initiate, investigate and mediate complaints of unfair employment practices; (f) by itself or with or by hearing examiners, to hold hearings, subpoena witnesses and compel their attendance, administer oaths, take the testimony of any person under oath and require the production for examination of any books and papers relating to any matter under investigation or in question. The commission may make rules as to the procedure for the issuance of subpoenas by individual commissioners and hearing examiners. Contumacy or refusal to obey a subpoena issued pursuant to this section shall

constitute contempt punishable, upon the application of the authority issuing such subpoena, by the superior court for the county in which the hearing is held or in which the witness resides or transacts business. No person shall be excused from attending and testifying or from producing records, correspondence, documents or other evidence in obedience to subpoena, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such person so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. The immunity herein provided shall extend only to natural persons so compelled to testify; (g) to utilize such voluntary and uncompensated services of private individuals, agencies and organizations as may from time to time be offered and needed; (h) with the cooperation of such agencies, (1) to study the problems of discrimination in all or specific fields of human relationships and (2) to foster through education and community effort or otherwise good will among the groups and elements of the population of the state. From time to time, but not less than once a year, as provided in section 4-60, the commission shall report to the governor, making such recommendations as it deems advisable and describing the investigations, proceedings and hearings it has conducted and their outcome, the decisions it has rendered and the other work performed by it. (1949 Rev., S. 7404; September, 1957, P.A. 11, S. 13.)

*Sec. 31-126. Unfair employment practices. It shall be an unfair employment practice (a) for an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, because of the race, color, religious creed, age, national origin or ancestry of any individual, to

refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against him in compensation or in terms, conditions or privileges of employment; (b) for any employment agency, except in the case of a bona fide occupational qualification or need, to fail or refuse to classify properly or refer for employment, or otherwise to discriminate against, any individual because of his race, color, religious creed, age, national origin or ancestry; (c) for a labor organization, because of the race, color, religious creed, age, national origin or ancestry of any individual to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer, unless such action is based on a bona fide occupational qualification; (d) for any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any unfair employment practice or because he has filed a complaint or testified or assisted in any proceeding under section 31-127; (e) for any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts herein declared to be unfair employment practices or to attempt to do so; (f) for any employer, employment agency, labor organization or person, except in the case of a bona fide occupational qualification or need, to advertise employment opportunities in such a manner as to restrict such employment so as to discriminate against individuals because of their race, color, religious creed, age, national origin or ancestry. The provisions of this section shall not apply to (1) termination of employment where the employee is thereupon entitled to benefits under the terms or conditions of any bona fide retirement or pension plan or collective bargaining agreement between the employer and a bona fide labor organization, (2) operation of the terms or conditions of any bona fide retirement or pension plan, (3) operation of terms or conditions

of any bona fide group or employee insurance plan or (4) operation of any bona fide apprenticeship system or plan. (1949 Rev., S. 7405; 1955, S. 3035d; 1959, P.A. 145, S. 3.)

*History: 1959 act added "age" to subdivisions (a), (b), (c) and (f), added the exception to subdiv. (f) and added the last sentence. See Sec. 28-17.
Cited. 140 C. 537.
Purpose of statute is to eliminate discrimination in employment for specified reasons, and it is only within these prescribed reasons that the statute operates. 17 CS 93. See note to Sec. 31-127.

*Sec. 31-127. Procedure. Any person claiming to be aggrieved by an alleged unfair employment practice may, by himself or his attorney, make, sign and file with the commission a complaint in writing under oath, which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unfair employment practice, and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The commission, whenever it has reason to believe that any person has been engaged or is engaging in an unfair employment pratice, may issue a complaint. Any employer whose employees, or any of them, refuse or threaten to refuse to comply with the provisions of this chapter may file with the commission a written complaint under oath asking for assistance by conciliation or other remedial action. After the filing of any complaint, the chairman of the commission shall refer the same to a commissioner or investigator to make prompt preliminary investigation of such complaint and, if such commissioner or investigator determines after such preliminary investigation that there is reasonable cause for believing that an unfair employment practice has been or is being committed as alleged in such complaint, he shall immediately endeavor to eliminate the unfair employment practice complained of by conference, conciliation and persuasion. No commissioner or investigator shall disclose what has occurred in the course of such endeavors, provided the commission may publish the facts in the case and any complaint which

has been dismissed and the terms of conciliation when a complaint has been adjusted. In case of failure to eliminate such practice, the investigator or investigating commissioner shall certify the complaint and the results of his investigation to the chairman of the commission and to the attorney general. The chairman of the commission shall thereupon appoint a hearing tribunal of three members of the commission or a panel of hearing examiners to hear such complaint and shall cause to be issued and served in the name of the commission a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such complaint, hereinafter referred to as the respondent, to answer the charges of such complaint at a hearing before such tribunal, at a time and place to be specified in such notice. The place of any such hearing may be the office of the commission or another place designated by it. The case in support of the complaint shall be presented at the hearing by the attorney general, who shall be counsel for the commission; and no commissioner who previously made the investigation or caused the notice to be issued shall participate in the hearing except as a witness, nor shall he participate in the deliberations of the tribunal in such case. Any endeavors or negotiations for conciliation shall not be received in evidence. The respondent may file a written answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony and be fully heard. The tribunal conducting any hearing may permit reasonable amendment to any complaint or answer and the testimony taken at such hearing shall be under oath and be transcribed at the request of any party. If, upon all the evidence, the tribunal finds that a respondent has engaged in any unfair employment practice, it shall state its findings of fact and shall issue and file with the commission and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair employment practice, and further requiring such respondent to take

such affirmative action, including, but not limited to, hiring or reinstatement of employees, with or without back pay, or restoration to membership in any respondent labor organization, as in the judgment of the tribunal will effectuate the purposes of this chapter. If, upon all the evidence, the tribunal finds that the respondent has not engaged in any alleged unfair employment practice, it shall state its findings of fact and shall similarly issue and file an order dismissing the complaint. The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure. Any complaint filed pursuant to this section must be so filed within ninety days after the alleged act of discrimination. (1949 Rev., S. 7406; 1959, P.A. 334.)

* History: 1959 act authorized the ordering of affirmative action and shortened period for filing complaint.
Former limitation period of six months did not begin to run until expiration of period within which it could reasonably be expected that application would be acted upon. 140 C. 537.
Order must be limited to unfair practice found to exist and should leave applicant free to determine whether or not he still seeks that employment; it should not be an affirmative order to employ the applicant. 17 CS 93. Former six months period of limitation cannot begin until the discrimination is established. 18 CS 131.

Sec. 31-128. Enforcement of orders. Appeals. (a) The commission may, through the attorney general, petition the court within the county wherein any unfair employment practice occurred or wherein any person charged with unlawful employment practice resides or transacts business, for the enforcement of any order issued by a tribunal under the provisions of this chapter and for appropriate temporary relief or a restraining order, and shall certify and file in the court a transcript of the entire record of the proceedings, including the pleadings and testimony upon which such order was made and the finding and orders of the hearing tribunal. Within five days after filing such petition in the court the commission shall cause a notice of such petition to be sent by registered or certified mail to all parties or their representatives. The court shall have jurisdiction of the proceedings and of the questions determined thereon, and shall have the power to grant such

relief by injunction or otherwise, including temporary relief, as it deems just and suitable and to make and enter, upon the pleadings, testimony and proceedings set forth in such transcript, a decree enforcing, modifying and enforcing as so modified, or setting aside, in whole or in part, any order of the commission or hearing tribunal. (b) No objection that has not been urged before the hearing tribunal shall be considered by the court, unless the failure to urge such objection is excused because of extraordinary circumstances. The findings of the hearing tribunal as to the facts, if supported by substantial and competent evidence, shall be conclusive. If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing, the court may order such additional evidence to be taken before the same hearing tribunal and to be made part of the transcript. The tribunal may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial and competent evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. (c) The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the supreme court of errors, on appeal by either party, irrespective of the nature of the decree or judgment. Such appeal shall be taken and prosecuted in the same manner and form and with the same effect as is provided in other cases of appeal to the supreme court of errors, and the record so certified shall contain all that was before the lower court. (d) Any respondent aggrieved by a final order of a hearing tribunal may obtain a review of such order in the superior court for the county where the unfair employment practice is alleged to have occurred or in the county wherein such person resides or transacts business by filing with the clerk

of said court, within two weeks from the date of such order, a written petition in duplicate praying that such order be modified or set aside. The clerk shall thereupon mail the duplicate copy to the commission. The commission shall then cause to be filed in said court a certified transcript of the entire record in the proceedings, including the pleadings, testimony and order. Upon such filing said court shall proceed in the same manner as in the case of a petition by the commission under this section and shall have the same exclusive jurisdiction to grant to the respondent such temporary relief or restraining order as it deems just and suitable, and in like manner to make and enter a decree enforcing or modifying and enforcing as so modified or setting aside, in whole or in part, the order sought to be reviewed. (e) Unless otherwise directed by the commission, tribunal or court, commencement of review proceedings under this section shall operate as a stay of any order. (f) Petitions filed under this section shall be heard expeditiously and determined upon the transcript filed, without requirement of printing. Hearings in the court under this chapter shall take precedence over all other matters, except matters, except matters of the same character. (1949 Rev., S. 7407.)

Substantial and competent evidence requires that evidence be such as would, in a jury trial, justify a refusal to direct a verdict. 140 C. 537.

"Substantial and competent evidence" discussed. 17 CS 99; 18 CS 129; 20 CS 172. Employee applicant not a necessary party on appeal; he can just set the statutory machinery in motion. 17 CS 96.

* * *

(AMENDMENTS)

Sec. 31-122, subsec. (h). "Commission" defined. "Commission" means the commission on * * * *human rights and opportunities* created by section 31-123. (1967, P.A. 636, S. 5.)

Sec. 31-122, subsec. (i). "Commissioner" defined. "Commissioner" means a member of the commission on * * * *human rights and opportunities.* (1967, P.A. 636, S. 6.)

Sec. 31-123. Commission on human rights and opportunities. Appointment. Duties. The commission shall * * * consist of *twelve* persons appointed by the governor. *On or before July* 15, 1967, *the governor shall appoint four members, each to serve for a term of five years.* On or before July fifteenth, annually *thereafter,* the governor shall appoint * * * members, each to serve for a term of five years to succeed those whose terms expire. The members of the commission shall choose, annually, from their number, a chairman and a deputy chairman. The commission shall investigate the possibilities of affording equal opportunity of profitable employment to all persons, with particular reference to job training and placement. The commission shall compile facts concerning discrimination in employment, violations of civil liberties and other related matters. The commission shall investigate and proceed in, as provided in sections 31-124 to 31-128, inclusive, all cases of discrimination in employment because of race, color, religion, *sex,* age, national origin or ancestry. The commission shall, as provided in section 4-60, report to the governor the result of its investigations with its recommendations for the removal of such injustices as it may find to exist. Except as provided in section 31-124, the members of the commission shall serve without pay, but their reasonable expenses, including necessary stenographic and clerical help, shall be paid by the state upon approval of the commissioner of finance and control. (1967, P.A. 426, S. 1; 636, S. 7.)

Cited. 153 C. 173.

Sec. 31-123a. Commission as secretariat to executive committee on human rights and opportunities. The commission on human rights and opportunities shall serve as the secretariat to the committee created by section 4-61b. (1967, P.A. 636, S. 9.)

Sec. 31-123b. Change of commission name. Wherever the term "commission on civil rights" appears in the general

statutes it shall be construed to mean "commission on human rights and opportunities." (1967, P.A. 636, S. 8.)

Sec. 31-124. Hearing examiners. Compensation of examiners and commissioners. There shall * * * be *fifteen* hearing examiners. *On or before July* 1, 1969, *the governor shall appoint seven hearing examiners, three for a term of five years, one for a term of four years, one for a term of three years, one for a term of two years and one for a term of one year from said July first.* On or before July first, annually *thereafter,* the governor shall appoint *three* hearing examiners, each to serve for a term of five years, to succeed those whose terms expire. Each such examiner and each commissioner shall receive *thirty-five* dollars per day for each day on which he conducts hearings, and their reasonable expenses, including necessary stenographic and clerical help, shall be paid by the state upon approval of the commissioner of finance and control. When serving as members of a hearing tribunal as hereinafter provided, each hearing examiner shall have the same subpoena powers as are granted to commissioners by subsection (f) of section 31-125. (1969, P.A. 656, S. 1.) Effective July 1, 1969.

Cited. 153 C. 173.

Sec. 31-125. Powers of the commission. The commission shall have the following powers and duties: (a) To establish and maintain * * * *such offices as the commission may deem necessary;* (b) to appoint such investigators and other employees and agents as it deems necessary, fix their compensation within the limitations provided by law and prescribe their duties; (c) to adopt, publish, amend and rescind regulations consistent with and to effectuate the provisions of this chapter; (d) to recommend policies and make recommendations to agencies and officers of the state and local subdivisions of government to effectuate the policies of this chapter; (e) to receive, initiate, investigate and mediate

complaints of unfair employment practices; (f) by itself or with or by hearing examiners, to hold hearings, subpoena witnesses and compel their attendance, administer oaths, take the testimony of any person under oath and require the production for examination of any books and papers relating to any matter under investigation or in question. The commission may make rules as to the procedure for the issuance of subpoenas by individual commissioners and hearing examiners. Contumacy or refusal to obey a subpoena issued pursuant to this section shall constitute contempt punishable, upon the application of the authority issuing such subpoena, by the superior court for the county in which the hearing is held or in which the witness resides or transacts business. No person shall be excused from attending and testifying or from producing records, correspondence, documents or other evidence in obedience to subpoena, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such person so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. The immunity herein provided shall extend only to natural persons so compelled to testify; (g) to utilize such voluntary and uncompensated services of private individuals, agencies and organizations as may from time to time be offered and needed; (h) with the cooperation of such agencies, (1) to study the problems of discrimination in all or specific fields of human relationships and (2) to foster through education and community effort or otherwise good will among the groups and elements of the population of the state; *(i) to require the posting by an employer employment agency or labor organization of such notices regarding statutory provisions as the commission shall provide, failure to*

*post which shall be subject to a fine of not more than two hundred fifty dollars.* From time to time, but not less than once a year, as provided in section 4-60, the commission shall report to the governor, making such recommendations as it deems advisable and describing the investigations, proceedings and hearings it has conducted and their outcome, the decisions it has rendered and the other work performed by it. (1967, P.A. 210, S. 1; 715, S. 1.)

Regulations promulgated under this section cited. 153 C. 172. Cited. 153 C. 173.

* * *

## TITLE VII — EQUAL EMPLOYMENT OPPORTUNITY DEFINITIONS

Sec. 701. For the purposes of this title —

(a) The term "person" includes one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trust, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954: *Provided,* That during the first year after the effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer

than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers: *Provided further*, That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin and the President shall utilize his existing authority to effectuate this policy.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its

members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) one hundred or more during the first year after the effective date prescribed in subsection (a) of section 716, (B) seventy-five or more during the second year after such date or fifty or more during the third year, or (C) twenty-five or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

**No. 72-601**

BARBARA COREY,

*Petitioner,*

—v.—

AVCO-LYCOMING DIVISION, AVCO CORPORATION,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

AVCO-LYCOMING DIVISION,
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

**No. 72-601**

BARBARA COREY,

*Petitioner,*

—v.—

AVCO-LYCOMING DIVISION, AVCO CORPORATION,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

Avco-Lycoming Division, Avco Corporation, your respondent, hereby opposes petitioner's prayer for a writ of certiorari filed on October 13, 1972 and requests that it be denied.

### Opinion Below

The opinion of the Supreme Court of Connecticut is *Corey* v. *Avco Lycoming Div., Avco Corp.*, 34 Conn. L.J. 3 (July 18, 1972) set forth in petitioner's Appendix (Pet. App. 1a-19a).[1]

[1] Except as otherwise indicated (Pet. App.- ) refers to petitioner's appendix, (Pet. Brief- ) refers to petitioner's brief, and (A- ) refers to respondent's appendix attached hereto. Petitioner is sometimes herein referred to as "Mrs. Corey" and respondent is sometimes herein referred to as "Avco".

## Questions Presented[1]

1. May questions which have not been presented, argued or considered below be presented by petitioner for the first time in her Petition for Writ of Certiorari?

2. Does a state court decision which held a) that a fair and impartial labor contract arbitration award constituted a bar and estopped a party to such proceeding from relitigating the same issues and b) that there was not sufficient evidence to support petitioner's claim made before the Commission on Human Rights and Opportunities under the state's Fair Employment Practices Act, raise a federal question reviewable by this court?

## Statement of Case

The following sets forth the facts as they were presented to and considered by the Supreme Court of the State of Connecticut and as they were set forth in respondent's appendix to its brief before that court. (A-1-15).[2]

The petitioner, Mrs. Barbara Corey was employed by the respondent on September 3, 1968. (Pet. App.-2a) Mrs. Corey had no previous work experience of any kind (A-12), and was hired for the job of rate clerk and assigned to the Traffic Division, Department 2K. The peti-

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[1] For purposes of simplicity, respondent has replied to each of petitioner's points in the order in which she has raised them. The questions presented herein apply, in whole or in part, to each point discussed below.

[2] As is more fully set forth in Point IV below, the petitioner chose not to file an appendix in the Supreme Court of the State of Connecticut.

tioner's scheduled hours of work were 8:15 a.m. to 5:00 p.m., Monday through Friday, which fact was fully explained to her prior to her date of employment. Mrs. Corey made no objection to working these hours at that time. (Pet. App.-2a)

Throughout the period of her employment, Mrs. Corey was being trained as a rate clerk, (A-10) which training was dependent upon the availability of a rate analyst, who instructed her during periods when his own work schedule permitted. (A-11)

Mrs. Corey requested time off at the end of October or beginning of November, a few weeks after the commencement of her employment with Avco and during the course of her training program. (A-13) The petitioner did not at this time request an adjustment in her scheduled hours of work, but demanded time off in order that she could leave the plant early on every Friday for a period of sixteen consecutive weeks.

Mrs. Corey's request for permission to take time off and leave early over the sixteen consecutive week period was denied. (Pet. App.-3a) On Friday afternoon, November 15, 1968, she left the plant approximately 35 minutes before the end of her scheduled shift. (Pet. App.-3a) A discharge hearing was held the following Monday and she was terminated for insubordination and for violation of the Plant Conduct Rules, including Rule 28 (leaving the plant before the end of the shift), Rule 29 (insubordinate conduct and refusal to follow a foreman's orders), and Rule 30 (neglect by an employee of the job duties and refusal to perform work assigned). (A-4)

Subsequently, Mrs. Corey filed a grievance against Avco through the union acting as her exclusive collective bargaining agent in which she alleged that her termination was unjust and discriminatory on religious grounds. Her grievance was filed pursuant to the procedure set forth in the collective bargaining agreement between Avco and petitioner's collective bargaining agent, the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 376. (Pet. App.-4a) Petitioner's grievance was prosecuted by the union with her full cooperation and participation through the steps of the procedure up to and including final and binding arbitration. (Pet. App.-4a)

The Award of the Board of Arbitration (A-2-6), issued on April 29, 1969, was confirmed and enforced in accordance with its terms by the Order of the Superior Court, dated June 5, 1969. Said order was a final judgment which was not appealed.

The Board of Arbitration found, on the basis of sworn testimony, including that of Mrs. Corey, that prior to her termination an Industrial Relations Counselor had discussed with petitioner the possibility of an assignment to a different clerical job with earlier, non-conflicting shift hours of work and that her response thereto had been to indicate a lack of interest in an alternative assignment. (Pet. App.-5a) Moreover, during the course of the arbitration hearing, petitioner reiterated her rejection of another Avco job offer of comparable employment at shift hours which would not conflict with her observance of the Sabbath contained in respondent's letter of March 19, 1969 to petitioner. (Pet. App.-5a)

The Board of Arbitration also found that the proof established that it was the practice of Avco not to accord extended special privileges with respect to hours of work and work assignments to individual employees whether the reason was religious or secular. It went on to find that the granting of a benefit to an individual of the type requested by the petitioner over a period of sixteen consecutive weeks would be considered a violation of the Labor Agreement unless Avco were similarly to grant the request of every other employee who wanted special hours for any reason. (A-4)

The award of the Board of Arbitrators was confirmed pursuant to §52-421 of the Connecticut General Statutes, and such confirmation made the award a final judgment from which no appeal was taken. (Pet. App.-7a) (See: Conn. Gen. Stat. §52-423).

On December 3, 1968, approximately two weeks after initiating her grievance, the petitioner filed her complaint with the Commission on Human Rights and Opportunities pursuant to Title 31-§122 *et seq.* of the Connecticut General Statutes—the Fair Employment Practices Act. Subsequent to the issuance of the Award of the Board of Arbitration, petitioner's complaint was heard before the Hearing Tribunal of the Commission on Human Rights and Opportunities and on August 7, 1969 that Tribunal issued its Decision and Order in favor of the petitioner directing that the petitioner be reinstated with back pay from the date of her discharge. This order was set aside on appeal to the Superior Court, which decision was affirmed by the Supreme Court of the State of Connecticut. (Pet. Brief-3, 4)

## INTRODUCTION

### No Discrimination Was Shown Nor Found in the Courts Below

There was no evidence of religious discrimination in the courts below, and, indeed, the finding made by the Board of Arbitration and courts alike specifically indicate the absence of any discrimination. The finding of the Board of Arbitration goes even further:

> 7. The grievant's reiteration at the arbitration hearing of her rejection of the company offer of March 19, 1969 (Tr. 87), of comparable employment at shift hours which would not conflict with her religious observance of the Sabbath further confirms the fact that *the Company intent was not discriminatory but rather the opposite.* (emphasis supplied) (A-5)

The Supreme Court of the State of Connecticut, noting the failure of the petitioner's proof of religious discrimination on the facts wrote:

> A careful analysis of the evidence before the hearing tribunal, previously recited in this opinion, serves to confirm the conclusion of the trial court that the findings of the tribunal (religious discrimination) were not supported by substantial and competent evidence. (Pet. App.-12a)

Judge Loiselle, in his concurring opinion in the court below, noted:

> I agree with the second ground of decision—that there is not sufficient evidence to support the conclusion of the Commission on Human Rights and Opportunities—and believe the disposition of this case should be made solely on that ground. (Pet. App. 13a)

The record below shows a complete absence of evidence of religious discrimination and the obvious undue hardship placed upon the Company in any attempt to adjust its schedules to fit those of an individual employee or the petitioner. The Company would be in violation of Article XIII, Section 3 of the labor contract (A-4); it could not maintain an efficient industrial operation (Pet. App.-7a); it would be in violation of its own rules (A-4); and, finally, as found by the Connecticut Supreme Court, it would be economically impossible to adjust itself to the varying schedules of single employees. (Pet. App.-12a)

Despite these facts, Mrs. Corey insists throughout her petition that discrimination exists or at least that this court may hypothetically assume discrimination for the purposes of review. The former position cannot be maintained, as this court has assiduously avoided overruling state court determinations on debatable factual issues, *Hoag* v. *New Jersey*, 356 U.S. 464 (1958); and the latter position cannot be maintained, as it is now axiomatic that this court will not review hypothetical questions. *Asbury Hospital* v. *Cass County, N. D.*, 327 U.S. 207 (1945).

The *sine qua non* of the first three points raised by the petitioner in her brief is this underlying assumption of discrimination. So for example, in Point I, petitioner raises the applicability of federal law to a state court proceeding reviewing a determination of a state agency under state law and the effect of the Supremacy Clause thereon. However, even assuming, *arguendo*, the applicability of federal law (Title VII of the Civil Rights Act of 1964) to state action under its Fair Employment Practices Act, there can be no review of such applicability absent a finding or even a modicum showing of discrimination. The

Federal Act is specifically designed to eliminate discrimination—whether under its aegis (Title 42 U.S.C. §2000e-2) or by deferral to an equivalent state procedure (42 U.S.C. §2000e-5). Where no discrimination is shown, the Act does not become effective and its "supremacy" *vel non* is academic.

The same disability arises in Point II of petitioner's argument. In this section, she states that certiorari should be granted because the Supreme Court of the State of Connecticut misapplied Section 701 of Title VII of the Civil Rights Act of 1964, as amended. As is pointed out below, the Connecticut court did not apply the Act nor did it have reason or occasion to do so. However, assuming, as petitioner does, that there was such an application, there is no reviewable issue presented to this court absent a showing of discrimination. Petitioner claims that the Randolph Amendment is applicable and that its criteria have not been met. However, as is indicated above, the Connecticut court found not only that the employer was unable to accommodate the employee without undue hardship but, in addition, that it was an economic impossibility. Hence, on the facts found, both the criteria set forth in the Randolph Amendment and the applicability of the EEOC guidelines likewise become academic.

Point III concerns itself with the finality and effect of a labor arbitration upon a subsequent action under a state's Fair Employment Practices Act. In the instant case, it was of course found 1) that the Board of Arbitrators had the power to hear the dispute regarding religious discrimination and 2) that Mrs. Corey had consented to and partici-

pated in such hearing.[4] (Pet. App.-4a) Quite apart from this finding, the court also found, as is indicated above, that "a careful analysis of the evidence . . . serves to confirm the conclusion of the trial court that the findings of the tribunal were not supported by substantial and competent evidence." Therefore, irrespective of the effect of the ruling by the Board of Arbitrators, the result must be the same. As there was insufficient evidence before the Hearing Tribunal to support the charge of religious discrimination, the holding by the majority opinion in the court below regarding the binding effect of a prior arbitration award was unnecessary. Hence, even assuming *arguendo* that that issue raises a federal question, the finding of no discrimination precludes a review of that question by this court. If a state court judgment rests upon two grounds, one of which may be federal and other of which is not, the United States Supreme Court does not have jurisdiction if the nonfederal ground is independent of the federal ground and adequate to support the judgment. *Jankovich* v. *Indiana Toll Road Commission,* 379 U.S. 487 (1965).

[4] There was, of course, no question raised by petitioner below that the proceedings below were anything other than fair and impartial and that all procedural due process guarantees were met; nor could such a claim be made. Mrs. Corey was represented by esteemed counsel both in the court below and before the Commission on Human Rights and Opportunities.

## POINT I

**The issue raised in Point I by petitioner was not raised in the courts below and does not present a federal question as the Supremacy Clause is not applicable.[5]**

As petitioner assumes a finding of discrimination, so also does she assume in Point I that "the decision of the Supreme Court is based solely on federal law. . . ." (Pet. Brief at p. 5). In point of fact, the court below did not apply federal law, as their review was of a ruling of a state agency based upon state law. Nevertheless, petitioner argues that the Supremacy Clause of the Constitution of the United States makes Title VII of the Civil Rights Act of 1964 paramount over the Connecticut Fair Employment Practices Act (Conn. Gen. Stat. §31-122 et seq.) as otherwise Congressional action would be frustrated. Nowhere in petitioner's brief before the Supreme Court of Connecticut is there any claim that the Civil Rights Act was applicable to the facts before them. Petitioner's sole reliance was on the Connecticut Fair Employment Practices Act—Chapter 563. (Pet. App.-2a, 4a). Implementation of an act is dependent upon the initiative of an individual to invoke its sanctions; [see: *Nash* v. *Florida Industrial Com.*, 389 U.S. 235 (1967)], and the failure of the petitioner to

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[5] The question presented in Point I of the petition is as follows:

1. Whether the Congressional design of uniform federal standards of discrimination coupled with joint state-federal enforcement of those standards as set forth in Section 706(c) of Title VII of the 1964 Civil Rights Act (as amended), when viewed in light of the supremacy clause, requires that the Connecticut Fair Employment Practices Law be construed as co-extensive with Title VII so as not to frustrate or deny the Federal substantive rights of complainant?

raise Title VII of the Civil Rights Act of 1964 in the court below precludes review of that Act upon a petition for writ of certiorari. *Monks* v. *New Jersey*, 398 U.S. 71 (1970). There is nothing which petitioner has presented to this court, nor is there anything in the opinion below which shows that the question was presented, and where a state court clearly does not rule on a question, it is presumed that it was not properly before it. *Street* v. *New York*, 394 U.S. 576 (1969).

Even more importantly, Title VII of the Civil Rights Act specifically provides for deferral to the state procedure. Petitioner could have filed a complaint under the provisions of the Equal Employment Opportunity Act. Title 42 U.S.C. §2000e-5. While Section 706(b) is designed to give state agencies a prior opportunity to consider discrimination complaints, a person claiming to be aggrieved by a violation of Title VII of the Civil Rights Act of 1964 may still seek redress under the Act if the procedure set out therein is followed. *Love* v. *Pullman*, 30 L. Ed. 2d 179 (1972). But petitioner made no attempt to assert any right she may have had under that Act, and instead seeks to have this court review hypothetical questions construing its effect in *vacuo*. Apparently, petitioner seeks to have this court rule that all state agencies defer to the Equal Employment Opportunity Commission under the guise of "cooperative federalism" despite Congress' clear intent to the contrary.

Petitioner admits at page eight (8) of her brief that the Connecticut Commission on Human Rights and Opportunities meets the standards set forth in the Act (Title VII §706(c) as amended) requiring deferral to the state agency. However, she argues that where a claimant under a state act fails in her proof, the state act immediately becomes "in-

valid and void" because the state decision somehow or other frustrates federal law. Hence, petitioner assumes, without ever having utilized its provisions, that a determination under Title VII must be different from that under the state act. [But see: *Dewey* v. *Reynolds Metal Co.*, 429 F. 2d 324 (6th Cir. 1970) aff'd, 402 U.S. 689]. In sum, even had petitioner raised the question, there is no indication in the record that federal law has been frustrated or that the state law stands as an obstacle to the objectives of Congress. Furthermore, it is clear that Title VII is not a Congressional filibuster silencing the states in this area. The exact opposite is the case. As petitioner admits at page 8 of her brief, "it is clear that Congress did not wish to preempt state agencies in this field. . . . " As such, petitioner's reliance upon Title VII and the Supremacy Clause is singularly inappropriate.

## POINT II

**The issue presented in Point II by petitioner was not raised below.**[*]

The second question raised by the petitioner has the same disabilities as the first. She states that certiorari should be granted because the Supreme Court of the State of Con-

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[*] The question presented in Point II of the petition is as follows:

2. Whether the Connecticut Supreme Court erred by ruling that under Dewey v. Reynolds Metal Co., 429 F.2d 324 (6th Cir. 1970), aff'd, an employer has no duty to accommodate an employee's religious belief, when the Federal Standard as expressed in the Equal Employment Opportunity Commission's Guidelines on Religious Discrimination 32 Fed. Reg. 10298, and the recent enactment thereof into law by Congress in the Equal Employment Opportunity Act of 1972 requires reasonable accommodation, and thereby violated the Supremacy Clause of the United States Constitution?

necticut misapplied Section 701 of Title VII of the Civil Rights Act of 1964, as amended. To misapply is to apply wrongly, but, in point of fact the court below did not apply the Act nor did it have reason or occasion to do so. The two grounds upon which the court below rested its opinion were 1) the finality and binding effect of the prior arbitration award and 2) the insufficiency of the proof presented by the petitioner. In reaching these conclusions, there was neither reliance nor application of Section 701 of Title VII of the 1964 Civil Rights Act as amended, as it was never raised. Indeed, any application of the Act would have been singularly inappropriate to the questions before the Connecticut courts.

Nevertheless, petitioner asserts that the court below should have applied the Randolph Amendment to the facts before it. The Randolph Amendment was adopted on March 24, 1972 after the submission of briefs and oral argument before the Connecticut Supreme Court. Mrs. Corey's discharge was on November 19, 1968, more than three years prior to the adoption of the Randolph Amendment. The award by the Board of Arbitrators was made on April 28, 1969, and the hearing before the Commission on Human Rights and Opportunities was held on May 7, 1969, both slightly less than three years before the effective date of the amendment. As the Randolph Amendment was not in effect on the date of discharge or during any stage of the proceedings below, it may not now be relied upon by petitioner. *Dewey* v. *Reynolds Metal Company,* 429 F. 2d 324 (6th Cir. 1970) at page 329.

Notwithstanding the inapplicability of the amendment, it is clear from the recital set forth in the introduction above that there were steps taken to accommodate the petitioner

and that the petitioner refused such accommodation. It is equally clear that it would not merely be an undue hardship of the type referred to in the Randolph Amendment but an economic impossibility for a company such as Avco to adjust its schedules to meet those of individuals in general and the petitioner in particular. Hence, the court below applied a similar, if not stronger, test than the Randolph Amendment may now require in Title VII claims made after March of 1972.

Quite apart from the substantive error of petitioner's claim relating to the Randolph Amendment, it would not, in any event, be applicable to a state court's review of a state agency proceeding. While a state court could, and most likely would, look at analogous federal and sister state statutes and the rulings thereon (as did the court below), those statutes and rulings are instructive—not binding.

In sum, the petitioner's second issue is not even remotely connected with the proceedings below and is hypothetical in nature. This court has consistently refused to review such questions. *Asbury Hospital* v. *Cass County,* 326 U.S. 207 (1945); *Congress of Industrial Organizations* v. *McAdory,* 325 U.S. 472 (1944); *McDonald* v. *Oregon R. & Nav. Co.,* 233 U.S. 665 (1914).

## POINT III

**The issues raised by petitioner in Point III do not raise a federal question and have been foreclosed by prior decisions.**[7]

The argument made by petitioner in Point III presents two separate issues. On the one hand, she argues that this court should grant certiorari by reason of the Connecticut Supreme Court's holding "that a prior arbitration constitutes collateral estoppel and/or res judicata on a subsequent action under a fair employment practices statute." (Pet. Brief—14) On the other hand, she argues that there is division among the circuits on the issue of whether prior arbitration should or should not be binding upon subsequent Title VII type relief.

The first proposition does not of course raise a federal question, and the second is merely an attempt to manufacture a federal question by wrongly assuming that Title VII of the Civil Rights Act of 1964 is applicable. What is or is not a final judgment for the purpose of *res judicata* is a matter of state law and, standing alone, presents no federal question. *The City and County of San Francisco* v. *Itsell*, 133 U.S. 65 (1890). Principles of finality are, within the broad limits of fundamental fairness, solely a state con-

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[7] The question presented in Point III of the petition is as follows:

3. Whether the Connecticut Supreme Court, by ruling that a prior arbitrator's award constituted res judicata and/or collateral estoppel as to Plaintiff's claim of religious dicrimination, frustrated enforcement at the state level of the national policy against discrimination as expressed in Title VII of the 1964 Civil Rights Act (as amended) and made mandatory on the states by the Supremacy Clause of the United States Constitution?

cern; *Konigsberg* v. *State Bar of California*, 366 U.S. 36 (1961), and Connecticut, like many jurisdictions, has held that a decision by an arbitrator consented to by the parties and confirmed by order of the Superior Court is a final determination from which an appeal may be had. (Pet. App. —7a-11a) That other jurisdictions may differ on a non-federal question does not give rise to relief in this court, as the doctrines of estoppel and *res judicata* do not raise federal questions. *Leonard* v. *Vicksburg, S.&P.R. Co.*, 198 U.S. 416 (1905).

Petitioner seeks to remove the obstacle by characterizing the problem as a conflict between two Goliaths of national policy—the encouragement and protection of arbitration and the elimination of discriminatory practices in employment. There is, of course, no such conflict in the case before the court. There was no discrimination found or shown, and there was no claim made under Title VII of the Civil Rights Act.

What petitioner seeks is to have this court once again review the holding made in *Dewey* v. *Reynolds Metal Co.*, 429 F.2d 324 (6th Cir. 1970) affirmed by an equally divided court in 402 U.S. 689 (1971). Unlike the present case, *Dewey* involved an action brought under the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000 (e)) which presented a federal question. However, *Dewey* also held that where the parties consent to arbitration and the issue of an alleged violation of civil rights is submitted at the arbitration hearing, then the arbitrator's decision thereon is final and binding. Any other result, the court wrote, "would bring about the death knell to arbitration of labor disputes, which has been so usefully employed in their settlement." As has been pointed out above,

a state court determination of the requisites of the finality proceedings in its courts does not raise a federal question. It is a matter of general law. *Northern Pacific R. Co.* v. *Ellis*, 144 U.S. 458 (1892).

Even assuming that Mrs. Corey had made a claim under the Civil Rights Act, the result would be no different, and on this point the circuits are unanimous. In *Rios* v. *Reynolds Metal Co.*, 5 F.E.P. 1 (5th Cir. 1972), the court wrote:

> II. The settlement of labor disputes by arbitration is a favored national labor policy. See, e.g., *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 1970, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199, 74 LRRM 2257; *United Steelworkers of America* v. *American Manufacturing Co.*, 1960, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403, 46 LRRM 2414; *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 1960, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424, 46 LRRM 2423; *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409, 46 LRRM 2416;
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> • • • • •
>
> We conclude that the policy which favors arbitration and the remedial policy of Title VII may be accommodated by a procedure which was alluded to in Hutchings but saved for decision on another day. It is that a district court may, under limited circumstances, defer to a prior arbitration award.
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> • • • • •
>
> First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satis-

fied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of proof in establishing these conditions of limitation will be upon the respondent as distinguished from the claimant.

The Fifth Circuit now recognizes that, in certain instances, deferral to arbitration is proper. The standards set forth by the court in its opinion are all present in the case before this court. The factual issues before the Board of Arbitrators were the same as before the Hearing Tribunal; the Arbitration Board had the power to hear the issues under the agreement; the evidence presented before it dealt adequately with all the factual issues and those issues were actually decided; and, finally, the arbitration proceeding was fair and free of procedural infirmities. Hence, even the Fifth Circuit would recognize that, had the present case been a Title VII request for relief, deferral to arbitration would have been proper.

In harmony with the Fifth Circuit are the Tenth Circuit[8] and the Sixth Circuit.[9] Hence, in reality what petitioner seeks is not a review of the instant case but a second look at *Dewey* recently decided by this court and followed on such facts as are presented here by all courts. This

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[8] *Alexander* v. *Gardner-Denver Co.*, 4 F.E.P. Case 1210 (10th Cir. 1972) aff'g 4 F.E.P. Cases 1205 (D.C. Colo.).

[9] *Dewey* v. *Reynolds Metal Co.*, 429 F.2d 324 (6th Cir. 1970) aff'd by an equally divided court 402 U.S. 689.

issue, even if it were applicable to the present case, has been effectively foreclosed and should not be reviewed again.

## POINT IV

**Petitioner's argument in Point IV was not raised below and does not present a federal question.**

Point IV of plaintiff's brief presents a general constitutional attack upon the appellate rules of the Supreme Court of the State of Connecticut claiming in substance that the rules violate the fundamental guarantees of due process protected by the 14th Amendment of the United States Constitution.[10] This type of general attack is, in and of itself, sufficient grounds for denying the petition. Rule 23(4)—Rules of the Supreme Court of the United States. *Galveston Causeway Const. Co.* v. *Galveston H. & S.A. Ry. Co.*, 262 U.S. 747 (1923). Petitioner had no more regard for the rules of practice in the court below. Despite the clear language of §31-128(c) of the Connecticut General Statutes requiring that "an appeal be taken and prosecuted in the same manner and form and with the same effect as in other cases of appeal . . . ," the petitioner chose to ignore the requirements of Sections 645 and 715 *et seq.* of the Rules for the Connecticut Supreme Court and failed to file an appendix to her brief. As with the other points mentioned above, there was no attempt in the court below to raise the issue that the requirements of the local rules violated due process requirements. Furthermore, the rules attacked have the force of statute, *In re Application of*

[10] Petitioner's claim in this regard has no bearing upon the substantive issues between Mrs. Corey and Avco and is one which might more properly be defended by the Attorney General's Office of the State of Connecticut. (see: Conn. Gen. Stat. §3-125)

*Dodd*, 132 Conn. 237 (1945), and this court has held that it will not pass upon the constitutionality of a state statute until the state court has had a chance to rule on it. *Adler* v. *Board of Ed. of the City of New York*, 342 U.S. 485 (1952).

The petitioner's claim in this regard is a patent attempt to cure her own errors by assigning constitutional deficiencies to rules which her counsel either refused or through inadvertency failed to follow. Such a claim is clearly frivolous and is certainly not supported by the cases cited which are inapposite.

## CONCLUSION

**For the foregoing reasons, the petition for a writ of certiorari should be denied.**

Respectfully submitted,

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**Proceedings Before the Hearing Tribunal of the Commission on Human Rights and Opportunities, May 6, 1969:**

ENTERED IN EVIDENCE before the Hearing Tribunal as Respondent's Exhibit #2 (Tr. 81), is the complete text of the Collective Bargaining Agreement between Avco-Lycoming Division, Avco Corporation and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW-AFL-CIO) and its Local 376, which Agreement is dated August 4, 1967, and provides, in pertinent part:

> "A grievance is a difference of opinion between the Company and the Union or an employee involving the interpretation or application of the terms of this Agreement. Nothing herein shall be interpreted as denying an employee the right to present his grievance directly to Management as provided in the Labor-Management Relations Act of 1947, as amended. The Union's as well as the employee's rights and benefits are set forth herein and, accordingly, where a grievance may be a proper subject for arbitration neither the Union nor the employees shall have other recourses, rights or remedies outside the provisions of the Agreement contained herein."
>
> Article IV, Section 1, pp. 3-4

> "The Board of Arbitration, when fully constituted, shall proceed to consider the grievance without delay and shall render its decision promptly following the conclusion of its taking evidence in the matter. The majority decision of the Board of Arbitration shall be final and binding upon the Company and the Union."
>
> Article XIII, Section 3, p. 31
> 4(d), p. 6

"Neither the Company nor the Union shall discriminate against any employee on account of race, creed, sex or national origin."

Article VIII, Section 3, p. 31

ENTERED IN EVIDENCE before the Hearing Tribunal as Respondent's Exhibit #3 (Tr. 91), is the complete text of a duly executed ARBITRATION AWARD made by a Voluntary Labor Arbitration Tribunal appointed under the auspices of the American Arbitration Association pursuant to the grievance and arbitration procedure contained in Article IV of the Collective Bargaining Agreement between the defendant-appellee, the Avco-Lycoming Division, Avco Corporation and Local Union 376 of the U.A.W., plaintiff-appellant's exclusive collective bargaining agent. The uncontested findings of fact and law are contained in the following text of the arbitration award, and were confirmed and enforced after a full hearing and argument by a Judgment entered by the Superior Court of Fairfield County, on June 5, 1969, by the Hon. James P. Doherty from which no appeal was taken:

"AMERICAN ARBITRATION ASSOCIATION
Voluntary Labor Arbitration Tribunal
In the Matter of the Arbitration

—Between—

LOCAL 376, U.A.W.

—and—

AVCO LYCOMING DIVISION, AVCO CORP.
Case Number: 12 30 0040 69

EXHIBIT 3

AWARD

The undersigned, constituting the Board of Arbitration, having duly heard the proofs, allegations and contentions of the parties, and after due consideration and deliberation

with respect thereto hereby find, decide, determine and render the following

AWARD:

1. The grievant, Barbara Corey, was hired on September 3, 1968, and assigned to the job of Rate Clerk—Office in Department 2K. Her hours of work were 8:15 A.M. to 5:00 P.M. Monday through Friday. They were explained to her during her employment interview and were accepted by her without protest. (Tr. 15, 126)

2. Subsequently, however, some two months later, in late October and in early November, the grievant advised various members of management that she desired to leave work early prior to the end of her scheduled shift on each Friday for a sixteen (16) consecutive week period, according to a set schedule, so that she might observe her religion's tenets with respect to the Sabbath. (Tr. 18, 19, 74)

3. The Company declined to modify the shift hours on the job occupied by her in Department 2K on the ground that it would constitute the according of a special privilege to the grievant. (Tr. 19, 20, 74) The possibility of a different clerical job assignment with earlier non-conflicting shift hours of work was broached during an interview between the grievant and an Industrial Relations Counselor. However, the grievant evidenced no interest therein at that time. (Tr. 127)

4. Notwithstanding the denial of permission to leave early on Friday the grievant left the plant prior to her scheduled quitting time on November 15, 1968. (Tr. 79) During her absence it would be necessary to have her work performed by employees in other job classi-

fications at a higher rate of pay or leave it undone. (Tr. 69) A discharge hearing was held on November 18, 1968, the next succeeding work day, and the grievant was terminated for violations of various Plant Conduct Rules, including Rule #28 (leaving the plant before the end of the shift), Rule #29 (Insubordinate conduct or refusal to follow a foreman's orders) and Rule #30 (Neglect by an employee of his job duties or refusal to perform work assigned). (Co. Ex. 3) The Rules have been in effect since 1952, are posted in the plant, were known to the grievant (Tr. 78) and are reasonable exercises of the Company's rule making prerogative. A grievance was timely filed on behalf of the grievant by the Union and processed through the steps of the procedure contained in Article IV of the Labor Agreement.

5. The proof establishes it to be the practice not to accord extended special privilege with respect to hours of work and work assignments to individual employees whether the reason proposed for the requested privilege was religious or secular (as in the case of requests for special accommodations to meet outside school, babysitting, transportation, and family obligations. (Tr. 154) It is clear from the cross examination of Union witnesses as well as the testimony of Company witnesses that the granting of a benefit to an individual of the type requested here over a period of sixteen (16) consecutive weeks would constitute a violation of the Article XIII, Section 3, prohibition on discrimination, negotiated and agreed to by the Company and the Union acting in its capacity as statutory bargaining agent for all of the members of the bar-

gaining unit, unless the Company were similarly to oblige every other employee who requested special hours for any reason. (See, for example, Tr. 117, 120) To put it another way, since the Company does not intend to accommodate itself to individual schedules, as indeed it could not if it desires to continue to maintain an efficient industrial operation, it cannot accede to grievant's request in this instance without itself being in violation of the cited Collective Bargaining Agreement proviso. The grievant has no right or entitlement to request the Company so to act.

6. A review of the matter cited by grievant in her complaint to the Connecticut Commission on Human Rights and Opportunities (Co. Ex. 4), the EEOC guidelines and opinions issued under Title VII of the Civil Rights Act which were cited and discussed by the advocates of the Parties during oral argument herein (Tr. 143-145), and the awards of other arbitrators who have been presented with similar special schedule accommodation requests, support the validity of the foregoing conclusion and do not operate to render nugatory the requirement that employees, regardless of race, creed, sex or national origin must obey the uniformly enforced rules with respect to work schedules.

7. The grievant's reiteration at the arbitration hearing of her rejection of the Company offer of March 19, 1969 (Tr. 87), of comparable employment at shift hours which would not conflict with her religious observance of the Sabbath further confirms the fact that the Company intent was not discriminatory but rather the opposite.

8. The discharge of the grievant was for just and sufficient cause.

Accordingly, under the circumstances of this case referred to hereinabove, the grievance hereby is, in all respects, denied; and the action of the Company in terminating the grievant should be and hereby is fully sustained and confirmed.

Dated: April 28, 1969

BURTON B. TURKUS
Burton B. Turkus,
Chairman

EDWARD S. GEE
Edward S. Gee,
Union Member of Board,
Dissenting

JOHN J. ARNOLD
John J. Arnold, Company
Member of Board,
Concurring

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On this day of April, 1969 before me personally came and appeared BURTON B. TURKUS, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

CLAIRE HELLERSTEIN
Notary Public

CLAIRE HELLERSTEIN
NOTARY PUBLIC, State of New York
No. 24-1749060
Qualified in Kings County
Commission Expires March 30, 1971

STATE OF CONNECTICUT
COUNTY OF FAIRFIELD } ss.:

On this 20 day of May, 1969 before me personally came and appeared JOHN J. ARNOLD, EDWARD S. GEE, to me known and known to me to be the individuals described in and who executed the foregoing instrument, and they acknowledged to me that they executed the same.

SAGNELLA
Notary Public
(Notarial
Seal)"

The following Judgment and Order of the Superior Court confirming and enforcing in all respects the Award of the Board of Arbitration (hereinabove contained), entered after the hearing before the Hearing Tribunal but prior to its Decision and Order, was brought to the attention of the Hearing Tribunal before the formulation of such Decision and Order, as an Appendix to the Brief of the Defendant-appellee in the proceedings before said Hearing Tribunal. The Court below was also asked to take judicial notice of this Judgment:

"No. 136591

AVCO LYCOMING DIVISION
(Stratford Plant)
AVCO CORPORATION,
*vs.*
LOCAL 376, U.A.W.

Superior Court,
Fairfield County,
(At Bridgeport)
June 5, 1969.

PRESENT: HON. JAMES P. DOHERTY

*Judgment*

This action, an application for confirmation of an award, came to this Court on May 27, 1969, when it was ordered that the same be heard at the Courthouse in Bridgeport on the 5th day of June, 1969, at 10:00 o'clock in the forenoon and that the plaintiff caused the defendant to be summoned to appear at said time and to show cause, if any there was, why said application should not be granted, which summons was duly served, as appears from the officer's return on file; and the action came thence to this day, when the parties appeared and were fully heard.

The Court finds that said award should be and it is hereby confirmed and ordered enforced in accordance with its terms and in all respects.

By The Court,
C. David Munich,
Asst. Clerk.

"No. 136591

| | |
|---|---|
| Avco Lycoming Division (Stratford Plant) | Superior Court, Fairfield County, (At Bridgeport) June 5, 1969. |
| vs. | |
| Local 376, U.A.W. | |

*Order Re Application For Confirmation Of Arbitration Award*

In the above-entitled case it is hereby Ordered that the Award be confirmed and enforced in accordance with its terms and in all respects and said Award is incorporated herein by reference.

By The Court,
James P. Dohrerty,
Judge"

PASQUALE CIPRIANO, the Assistant Director of Industrial Relations for Avco Lycoming Division, Avco Corporation, called as a witness by Avco, testified on direct examination as follows:

1. That there are three bargaining units at the Stratford plant representing approximately one-half of Avco's employees, including Local 376 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, of which Mrs. Corey was a member. That there is a collective bargaining agreement between Avco Corporation and Local 376 dated August 4, 1967, which agreement was in effect during the period of time that Mrs. Corey was employed by Avco. (Tr. 79, 80)

2. That Mrs. Corey was employed by Avco on September 3, 1968 and that her employment was terminated on November 18, 1968. That following the termination of her employment Mrs. Corey filed a grievance under and pursuant to the terms of the collective bargaining agreement and that said grievance was processed through arbitration by Local 376 which was certified by the National Labor Relations Board to be the collective bargaining agent for the members of the collective bargaining unit to which Mrs. Corey belonged. (Tr. 81, 82)

3. That pursuant to the provisions of Article IV of the collective bargaining agreement, a hearing was held before the Board of Arbitration on Mrs. Corey's grievance on March 27, 1969, during which Mrs. Corey testified as a witness in her own behalf. That following the hearing on March 27, 1969, the Board of Arbitration issued its Award, which Award was

dated April 28, 1969, and documented as American Arbitration case number 12 30 0040 69. (Tr. 84, 85, 86) (The complete text of said Award is hereinabove contained).

4. That the hours of work in department 2K during October and November, 1968 were 8:15 a.m. until 5:00 p.m. That Mrs. Corey was the only employee in department 2K assigned to the job classification of rate clerk. (Tr. 93, 94)

5. That Avco Corporation sent a letter dated March 19, 1969 to Mrs. Corey regarding an offer of employment as a Crib Control Clerk in Department 19 S. (Tr. 101, 107, 108)

On *cross-examination* this witness testified as follows:

6. That during the grievance proceedings under the terms of the contract between Avco and Local 376, U. A. W., Mrs. Corey was represented by a union representative of Local 376, U. A. W. (Tr. 114)

7. That those Jewish employees of Avco that are members of a bargaining unit are not generally permitted to take time off to observe Rosh Hashana because the bargaining agreement sets forth only specific holidays. Some of such employees may be given the time off without pay, but this is a decision within the discretion of individual departmental supervisors. (Tr. 117)

8. That Yom Kippur is not a listed holiday for employees in the bargaining unit. (Tr. 117)

9. That since Mrs. Corey was still in the midst of the training process up to the termination of her employ-

ment with Avco, and that she still required and did receive considerable supervision, she was not permitted to adjust her scheduled hours of work; that since Mrs. Corey was the only rate clerk in her department she received different substantive training than any other employee in her department. (Tr. 119, 120, 121)

10. That the letter from Avco to Mrs. Corey dated March 19, 1969, reaffirmed the job offer which had been made to Mrs. Corey by Mrs. Stoddard in the plant. (Tr. 122)

11. That the job referred to in the letter of March 19, 1969, was for a Crib Control Clerk in Department 19 S. (Tr. 123)

12. That from time to time employees of various religious beliefs request time off for religious holidays and Avco accedes to such requests upon occasion, but such requests are very, very irregular and not for the same day for a period of sixteen weeks. (Tr. 126)

On *redirect examination* this witness testified as follows:

13. That during the period of her employment Mrs. Corey had one day off with pay for personal reasons; that when an employee takes an occasional day off for personal reasons the Company would not always know if the time off in fact was taken for a religious observance. (Tr. 137, 138)

14. That there was no one working in Department 2K prior to 8:15 a.m. (Tr. 142)

15. That Mrs. Corey's training was dependent upon the rate analyst for supervision; that rate analysts were

not available at all times during the day because they had other responsibilities to perform. (Tr. 146)

On *recross-examination* this witness testified as follows:

16. That the need for Mrs. Corey to be present until 5:00 p.m. every day was the same need that existed for other employees to be available in the event anything had to be done. (Tr. 147)

On *redirect examination* this witness testified as follows:

17. That during Mrs. Corey's absence from Department 2K her work and duties were performed by a rate analyst who was in a higher job classification and was paid more than Mrs. Corey. (Tr. 150, 151)

On *recross-examination* this witness testified as follows:

18. That the rate analyst who did Mrs. Corey's work also performed this job during her illness and on the Friday afternoon that Mrs. Corey left early in contravention of company orders. (Tr. 151)

Barbara L. Corey, the plaintiff in these proceedings, called as a witness by the Commission, testified on direct examination as follows:

1. That prior to seeking employment with Avco-Lycoming Division, Avco Corporation, in August, 1968, she had no previous work experience. (Tr. 15)

2. That she was applying to Avco for her first full-time job; that the job application and interview were made on the same day and that she was interviewed by Mr. Tigano in the Traffic Department. (Tr. 18, 19)

3. That she applied for a job as a rate clerk and was assigned the job of rate clerk in the Traffic Department. (Tr. 21)

4. That she was told her scheduled hours of work were from 8:15 a.m. until 5:00 p.m. on the day she was employed. (Tr. 25)

5. That she worked from September, 1968, until November, 1968, during which time she was in the hospital one week and had taken one day off for personal business. (Tr. 28)

6. That in late October Mrs. Corey went to see Mr. Marfiak, the Manager of the Traffic Department, and told him that she was a Seventh Day Adventist and that she would require time off; that Mr. Marfiak indicated she could not have the time off requested. (Tr. 28, 29, 30)

7. That subsequent to her initial interview with Mr. Marfiak she was advised to see Mrs. Stoddard concerning a job on an earlier shift. (Tr. 30)

8. That she was in the hospital from November 4 to November 9, 1968 and returned to work on November 10, 1968; that on Friday, November 15, 1968 the sun set before 5:00 p.m.; that she again informed Mr. Marfiak of her necessity of leaving early, about 4:45 p.m.; that Mr. Marfiak denied her permission to leave the plant early, but, nevertheless, she left the plant even earlier than requested at about 4:25 p.m. on Friday, November 15, 1968. (Tr. 31, 32, 33, 34)

9. That she was terminated from her employment on the following Monday at a meeting with Mr. Marfiak,

two Union stewards and two other men for insubordination. (Tr. 35)

10. That she had taken a Massachusetts calendar to Mr. Marfiak to show him the time she wished to leave the plant. (Tr. 38)

11. That Mrs. Stoddard attempted to find her a comparable job with earlier hours. (Tr. 42)

On *cross-examination* this witness testified as follows:

12. That other then baptismal rules and the Bible, there are no published set of rules to be followed by Seventh Day Adventists and that whether a particular activity is work is determined by each person's individual interpretation of what the Bible says. (Tr. 44, 46)

13. That subsequent to her discharge hearing on November 18, 1968, she immediately filed a grievance pursuant to the grievance procedure at the plant alleging that her termination and discharge was unjust; that she was a member of Local 376, U. A. W.; that the Union represented her throughout the grievance procedures; and that the basis for the grievance was her allegation of discrimination on account of her religion. (Tr. 47)

14. That her grievance was presented before the Board of Arbitration on March 27, 1969; that she was represented by the Union throughout the proceedings and testified as a witness. (Tr. 48)

15. That she worked in Department 2K under Mr. Tigano and Mr. Marfiak; that during the course of her employment she was being trained by Mr. Tigano

and a rate analyst whose hours of work were from 8:15 a.m. to 5:00 p.m. (Tr. 49)

16. That she was told what the hours of work were in Department 2K by the secretary on the day of her job interview and that she did not object at that time to these hours of work. (Tr. 53)

17. That between September and November of 1968 she took one day off for personal reasons and she was out for one week because of illness. (Tr. 54)

18. That in contrast to her earlier testimony before the Hearing Tribunal that Mrs. Stoddard told her there was no job available on an earlier shift, she admitted testifying, before the Board of Arbitration, that Mrs. Stoddard had advised her there was shop work available on an earlier shift. (Tr. 54)

19. That the list of sunset times that she presented to Mr. Marfiak indicating the times by which she wished to be out of the plant were actually taken from a Massachusetts newspaper and represented a timetable for sundown in Massachusetts, not Connecticut. (Tr. 55-61)

20. That the passage from Exodus 120 is the basis for her Sabbath belief and is the only written publication of the rule regarding the observance of the Sabbath other than the baptismal card that she signed when she joined the church. (Tr. 68, 69)

21. That other than the Bible there is no written publication or written rule of her church or any official word as to what constitutes work on the Sabbath and what does not constitute work on the Sabbath. (Tr. 72, 73)

## Connecticut General Statute § 3–125

§ 3–125. DUTIES OF ATTORNEY GENERAL; DEPUTY; ASSISTANTS

The attorney general shall appoint a deputy, who shall be sworn to the faithful discharge of his duties and shall perform all the duties of the attorney general in case of his sickness or absence. He shall appoint such other assistants as he deems necessary, subject to the approval of the governor. The attorney general shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which prosecuting officers have direction. He shall appear for the state, the governor, the lieutenant governor, the secretary, the treasurer and the comptroller, and for all heads of departments and state boards, commissioners, agents, inspectors, committees, auditors, chemists, directors, harbor masters and institutions and for the state librarian in all suits and other civil proceedings, except upon criminal recognizances and bail bonds, in which the state is a party or is interested, or in which the official acts and doings of said officers are called in question in any court or other tribunal, as the duties of his office require; and all such suits shall be conducted by him or under his direction.

## Rules for the Supreme Court of Connecticut §§ 645, 715, 716

Sec. 645. ——EVIDENCE NOT TO BE PRINTED IN RECORD

Evidence of witnesses before a court, including evidence necessary upon an appeal from the denial of a motion to set aside a nonsuit, evidence taken before a committee or state referee and filed in court in connection with exceptions to a report, and, except as hereinafter provided, evidence taken before an administrative officer or board and filed in court in connection with a petition or an appeal or admitted at the hearing shall not be printed in the record except as it is made a part of a pleading, or of a finding or report in explanation of a ruling made in the course of the hearing, but it may be presented in an appendix to a brief as hereinafter provided. The printing of evidence taken before a zoning board of appeals or zoning commission shall be governed by Sec. 647, and the printing of evidence contained in exhibits annexed to pleadings shall be governed by Sec. 673. (P. B. 1951, Sec. 415; 1963.)

Sec. 715. EVIDENCE PRINTED IN APPENDICES

Sec. 716. ——IN GENERAL

Except as provided in Secs. 645, 646 or 647, any portion of a transcript of evidence filed pursuant to Sec. 641, or, in an appeal from a zoning board of appeals or a zoning commission, any portion of the record before the board or commission which was returned to the trial court but not included in the printed record, shall, if a party desires to present it to the court, be printed, and only printed, in an appendix to the brief. Only evidence material to the issues shall be printed. (P. B. 1951, Sec. 447.)

## Title 42 U.S.C. § 2000e-5(a)(b)(c)(d)

§ 2000e–5. ENFORCEMENT PROVISIONS—CHARGES BY PERSONS AGGRIEVED OR MEMBER OF COMMISSION; COPY OF CHARGES TO RESPONDENTS; INVESTIGATION OF CHARGES; CONFERENCE, CONCILIATION, AND PERSUASION FOR ELIMINATION OF UNLAWFUL PRACTICES; PROHIBITED DISCLOSURES; USE OF EVIDENCE IN SUBSEQUENT PROCEEDINGS; PENALTIES

(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty

of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

STATE OR LOCAL ENFORCEMENT PROCEEDINGS; NOTIFICATION OF STATE OR LOCAL AUTHORITY; TIME FOR FILING CHARGES WITH COMMISSION; COMMENCEMENT OF PROCEEDINGS

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

SAME; NOTIFICATION OF STATE OR LOCAL AUTHORITY; TIME FOR ACTION ON CHARGES BY COMMISSION

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice oc-

curring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

TIME FOR FILING CHARGES AFTER OCCURRENCE OF UNLAWFUL PRACTICES OR TERMINATION OF STATE OR LOCAL ENFORCEMENT PROCEEDINGS; FILING OF CHARGES BY COMMISSION WITH STATE OR LOCAL AGENCY

(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(D)

JAN 4 1973

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-601

BARBARA COREY,

*Petitioner,*

v.

AVCO-LYCOMING DIVISION, AVCO CORPORATION,

*Respondents.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT


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BARBARA COREY,

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AVCO-LYCOMING DIVISION, AVCO CORPORATION,

*Respondents.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut entered July 18, 1972.

## OPINIONS BELOW

The Memorandum of Decision of the Hearing Tribunal and the Memorandum on Setting Aside Decision and Order of Hearing Tribunal are unreported and are set out in Appendix, pp. 20a thru 28a of Petitioner's original brief. The Opinion of the Supreme Court of the State of Connecticut is unreported. It is set out in the Appendix, pp. 1a thru 19a of Petitioner's original brief.

## JURISDICTION

The judgment of the Supreme Court of the State of Connecticut was entered on July 18, 1972. The jurisdiction of this Court rests on 28 USC § 1257 (3).

## QUESTIONS PRESENTED

1. Whether or not the issues raised in the Petitioner's Brief in support of a Writ of Certiorari were raised or considered by the Connecticut Supreme Court.

2. Whether or not there was substantial and competent evidence to support the Hearing Tribunal's Decision.

## STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute involved is Section 701 of Title VII of the 1964 Civil Rights Act as amended P.L. No. 92-261, § 11, 86 Stat. 111, amending 42 U.S.C. § 2000e (1970). The constitutional provisions are United States Constitution; First Amendment and Fourteenth Amendment.

## STATEMENT OF CASE

Petitioner, Barbara Corey was hired by AVCO Corporation on September 3, 1968 as a rate clerk assigned to the Traffic Division, Department 2K. At the time of her employment and for six years prior thereto, she had been a Seventh Day Adventist.

A few weeks after her employment, Mrs. Corey requested permission to adjust her working hours on upcoming Fridays to observe the Seventh Day Adventist's Sabbath. Permission was denied by AVCO. Notwithstanding the denial, Mrs. Corey left work in accordance with her Sabbath observance and was fired by AVCO.

Subsequently, Mrs. Corey filed a grievance pursuant to the collective bargaining agreement and at the same time filed a complaint with the Commission on Human Rights and Opportunities.

The Arbitration Board decided the grievance against Mrs. Corey on April 28, 1969, which award was confirmed on May 27, 1969.

After investigation, the complaint was certified and the commission caused a public hearing to be held on May 6, 1969. It was at these proceedings that the federal questions sought to be reviewed herein were first raised[1] by Amended Answer to Complaint filed by Avco.[2]

The Hearing Tribunal passed upon these questions in its Memorandum dated August 7, 1969 as follows:[3]

> ". . . The challenge of jurisdiction of the Tribunal is overruled. It is impossible for statutory responsibility of the Commission to be contracted away between employers and employers' unions. Nothing can deprive the Commission on Human Rights of its statutory jurisdiction and responsibility to hear such questions. . . ."

Avco then instituted "a record appeal" of the order of the Hearing Tribunal. The Superior Court on May 28, 1970 entered judgment against the plaintiff. The Court in its Memorandum on Setting Aside Decision and Order of Hearing Tribunal reconsidered the federal questions sought to be reviewed herein and indicated that:

". . . the findings and conclusions of the Board of Arbitra-

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[1]See Appendix (Transcript of May 6, 1969, pp. 5-14, 26-7 and 32-3), pp. 40a thru 50a.
[2]See Appendix (Commission's Exhibit #3 before Hearing Tribunal), p. 32a.
[3]See Appendix specifically #5 of Findings, p. 30a (see also Conclusion, p. 31a).

tion constitute collateral estoppel by judgment binding the Hearing Tribunal . . . By reason of her election of remedies. Complainant was foreclosed . . . etc. . . .[4]

The plaintiff appealed the lower court decision to the Supreme Court of the State of Connecticut and included in its assignments of errors,[5] the federal questions sought to be reviewed in this instance.

Thereafter by decision dated July 18, 1972, the Supreme Court of the State of Connecticut considered said assignments of error and entered judgment of "no error," thereby affirming the lower court's decision.

## REASONS FOR GRANTING WRIT

This Brief is being filed to reply to two points raised in the Respondent's Brief in Opposition to the granting of the Writ of Certiorari. These points are that there was not substantial and competent evidence to support the Hearing Tribunal's Decision and that certain questions raised in the Petition for Writ of Certiorari were not raised below.

The Petitioner asserts that there was substantial and competent evidence to support the conclusion of the Hearing Tribunal that discrimination occurred. It is elementary that the definition or standard by which a concept is measured will determine whether or not it exists. This is especially so in the case of something as subtle as discrimination which the Connecticut Supreme Court has ruled often must be established by inference. *International Brotherhood* v. *Commission on Civil Rights,* 140 Conn. 537, 542 (1953). The Petitioner submits that the only reason that the Connecticut Supreme Court did not find discrimination was that the standard it ap-

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[4]See Appendix, p. 20a et. seq.
[5]See Appendix specifically #3, 4, 5, 6, 7 and 10, p. 35a.

plied in defining religious discrimination was incorrect. The Connecticut Courts reliance on the Sixth Circuit's opinion in *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970) rehearing denied, aff'd by an equally divided court 402 U.S. 689 which definition is no longer the correct interpretation of Title VII of the 1964 Civil Rights Act (42 U.S.C. 2000e et seq) if it ever was. The Connecticut Court might have reached a different conclusion but for its reliance on this incorrect interpretation of federal law. This Court should reverse in light of the Equal Employment Opportunity Act of 1972 and allow the Connecticut Court to reconsider the question.

The application of Title VII of the 1964 Civil Rights to the case was considered as early as the arbitration hearing. The question of the interpretation and applicability of Title VII was raised and considered by the Connecticut Supreme Court as can be seen by its reliance on *Dewey*, supra, for both the appropriate standard of religious discrimination and the weight to be accorded a prior arbitration award.

Finally, the issue of the Petitioner's constitutional First Amendment rights was raised below (Pet. App. pp. 35a-36a #10). In this regard, the controlling case of *Katzenbach* v. *Morgan*, 384 U.S. 641 (1965) is sufficient reason, in and of itself, for this court to allow the Writ to issue.

## I.

The issue of the Complainant's right to religious freedom was raised in the Petitioner's Assignment of Errors below (Pet. App. pp. 35a-36a #10)[1]. This issue was also briefed before the Connecticut Supreme Court. The enactment by Congress of the Equal Employment Opportunity Act of 1972[2] brings this

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[1]Except as otherwise indicated (Pet. App. ) refers to petitioners original appendix, (Pet. Brief — ) refers to petitioners original Brief, (Resp. App. — ) refers to respondent's appendix, (Resp. Brief — ) refers to respondent's brief.

[2]P.L. 92-261 see especially §11, 86 Stat 111 amending 42 U.S.C. §2000e. (1970).

case squarely in point with *Katzenbach* v. *Morgan,* 384 U.S. 641 (1965). In both *Katzenbach* and the instant case Congress had acted to protect important constitutional rights; in *Katzenbach* the right to vote under the Fourteenth and Fifteenth Amendments and in this case the right of religious freedom under the First and Fourteenth Amendments. The question in both cases is identical; whether state laws can be interpreted to abridge the equal protection of the law which Congress, by its enactment of legislation in question, had sought to provide. A Writ of Certiorari should be granted to review the Decision below in light of this Court's holding in *Katzenbach.*

Similarly the interpretation of religious discrimination under Title VII of the 1964 Civil Rights Act[3] and the relationship of arbitration to Title VII proceedings were raised below. As the Connecticut Supreme Court notes, "The plaintiff would have us ignore the *Dewey* rule and follow the Fifth Circuit's decision in *Hutching* v. *United States Industries, Inc.,* (Pet. App. p. 11a, citation omitted). Both of these cases involve the interpretation of Title VII rights. Finally, in reaching its decision the court relied exclusively on *Dewey* v. *Reynolds Metals Co.* 429 F.2d 324 (6th Cir. 1970) rehearing denied, affirmed per curiam by an equally divided court 402 U.S. 689. The issue of the correct interpretation of the Petitioner's rights under Title VII was therefore raised, considered and, in fact, relied upon in the Court's interpretation of the Connecticut Fair Employment Practices Law. The issue of federal supremacy is therefore inherent in the Connecticut Court's Opinion.

## II.

There was substantial and competent evidence to support the Hearing Tribunal's Decision; the reversal of the tribunal

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[3]42 U.S.C. 2000e et seq. (1970)

on this point was the result of reliance on an incorrect interpretation of Title VII.

Congress, by its enactment of the Randolph Amendment sought to clearly define religious discrimination in accord with its original intent in enacting the 1964 Civil Rghts Act. The language of the Equal Employment Opportunity Act of 1972 requires accommodation of an employee's religious belief unless hardship can be shown.[4]

The respondent in this case urges, in effect, that these rights are precluded by binding arbitration. The decision of the Board of Arbitration provided in relevant part:

> "6. A review of the matter cited by grievant in her complaint to the Connecticut Commission on Human Rights and Opportunities (Co. Ex. 4), *the EEOC guidelines and opinions issued under Title VII of the Civil Rights Act which were cited and discussed by the advocates of the Parties* during oral argument herein (Tr. 143-145), and the awards of other arbitrators who have been presented with similar special schedule accommodation requests, support the validity of the foregoing conclusion and do not operate to render nugatory the requirement that employees, regardless of race, creed, sex or national origin must obey the uniformly enforced rules with respect to work schedules.
>
> 7. The grievant's reiteration at the arbitration hearing of her rejection of the Company offer of March 19, 1969 (Tr. 87), of comparable employment at shift hours which

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[4]Section 701(j) of Title VII of the 1964 Civil Rights Act (as amended) provides:

> "(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

> would not conflict with her religious observance of the Sabbath further confirms the fact that *the Company intent was not discriminatory* but rather the opposite."[5]

It is therefore clear that the applicability of the Guidelines on Religious Discrimination[6] of the Equal Employment Opportunity Commission were involved in this case from its very inception. It is equally clear that the Board of Arbitration was concerned only with discriminatory intent. This however does not conform with this Court's teaching in *Griggs* v. *Duke Power Co.*[7] that:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation 401 U.S. 424 at 431 (1971).

The Guidelines mentioned above are similarly aimed at the practices of employers which, though neutral on their face, operate to discriminate against an employee's religious beliefs or practices. The Board of Arbitration's award did not provide that protection.

The respondent's reliance on *Rios* v. *Reynolds Metals Co.*[8] is superficial, at best. The general statement that the Board of Arbitration award met the five standards enunciated by the Court in *Rios* does not withstand close scrutiny. As noted above, the Board of Arbitration was concerned with discriminatory intent and not with the discriminatory effects of practices neutral on their face. Having misapplied the relevant standard for determining discrimination, the decision of the Board of Arbitration was so tainted as to preclude reliance on *Rios*. *Rios*, in fact, would preclude reliance on the arbitration award in this case.

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[5]Resp. App. p. 5a, emphasis added.
[6]33 Fed. Reg. 10296 (1967).
[7]401 U.S. 424 (1971).
[8]____F. 2d. ____, 5 F.E.P. Cases 1 (5th Cir. 1972)

The Hearing Tribunal of the Commission on Human Rights, however, concluded in its Memorandum of Decision[9] that the Complainant had been discriminated against. The Tribunal found that persons of other religious faiths were allowed to take time off (Fact #6, Pet. App. p. 29a) and concluded that Complainant was treated more strictly than others (Conclusion #2, Pet. App. p. 31a). The Hearing Tribunal's findings show that the Complainant was willing to accommodate (Finding #3, Pet. App. p. 30a) but that the respondent had failed to show that there was an attempt to accommodate the Complainant's religious beliefs when she was discharged. (Finding #4, Pet. App. p. 30a).

The decision of the Connecticut Supreme Court also misinterprets the definition of discrimination in determining if there was substantial and competent evidence. The Connecticut Supreme Court notes that the plaintiff and hearing tribunal commit fundamental error by equating "religious discrimination with a failure to accommodate" (34 Conn. L.J. #3 pp. 5-6 Pet. App. p. 12a). The court, citing Dewey, states that it agrees with the Board of Arbitration that an employer should not have to accommodate itself to employees' schedules. However, Congress has indicated that this was exactly what it meant (Equal Employment Opportunity Act of 1972 *supra*). The Guidelines in effect at the time the discrimination occurred required not general assumptions of disruption but:

> (d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people. E.E.O.C. Guidelines on Religious Discrimination 32 Fed. Reg. 10298 (1967).

This analysis was performed by neither the Board of Arbitratime nor the Courts below in this case.

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[9]Pet. App. pp. 28a-31a.

Finally, the Connecticut Court cites *Dewey* v. *Reynolds Metals Co.* supra, for the proposition that an "employer ought not to be forced to accommodate each of the varying beliefs and practices of his employees" Id at 335. The reliance on *Dewey*, a case under Title VII is misplaced for at least three reasons. First *Dewey* was decided under the 1966 Guidelines on Religious Discrimination[10] which did not require accommodation and not the 1967 Guidelines[11] which were in effect at all times in the instant case. Secondly, the decision in *Dewey* has been specifically rejected by Congress in the Equal Employment Opportunity Act of 1972, supra. Finally, as this Court has recently noted, a 4-4 affirmance is not entitled to precedential weight. *Neil* v. *Biggers*, ____ U.S. ____ 41 L.W. 4064, 4066 (1972) citing *Ohio ex rel Eaton* v. *Price*, 364 U.S. 263, 264 (1960).

Therefore, the failure to find substantial and competent evidence was the result of the application of an incorrect standard, that of *Dewey*, and not a lack of evidence by the Complainant before the Hearing Tribunal.

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[10]The less stringent standard as applied in *Dewey* involved the following language in the 1966 Guidelines:

> Section 1605.1 (a):
> "(3) However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday."
>
> Section 1605.1(b):
> "(3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs."

The language of the 1967 Guidelines, in effect at all times relevant in this case set forth a much stricter standard. See Pet. App. pp. 38a thru 39a.

[11]Pet. App. pp. 36a thru 39a.

## CONCLUSION

There was substantial and competent evidence before the Hearing Tribunal to support Complainant's allegations of religious discrimination. Both the Board of Arbitration and the Court below misinterpreted the definition of discrimination; the Board of Arbitration when it looked only at intent and misapplied the Guidelines and the Connecticut Supreme Court in its reliance on *Dewey*. The applicability of federal law was properly before the court below and in any case the Connecticut Court's reliance on federal decisions presents adequate bases for this Appeal. The Connecticut Court's decision, but for *Dewey*, which has been overruled at the very least regarding the definition of religious discrimination, might well have been different (See Pet. App., pp. 13a-19a, concurring opinion of Judge Loiselle.) Accordingly, the Appellant respectfully requests that this Court issue a Writ of Certiorari to review and determine the remaining viability, if any, of its decision in *Dewey* v. *Reynolds Metals Co.*

Respectfully submitted,

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